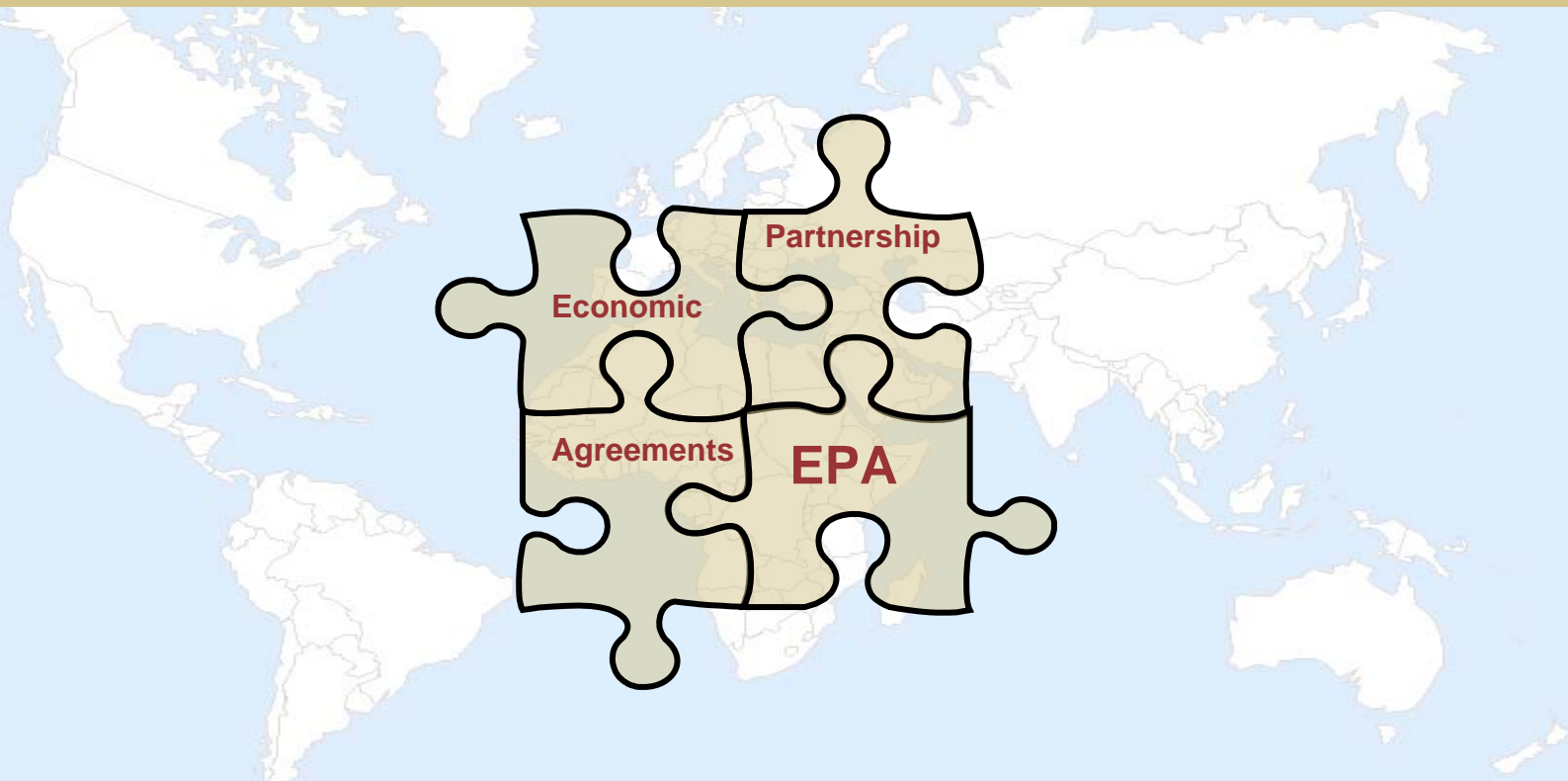


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TRADE MATTERS

Cariforum EPA and beyond: Recommendations for negotiations on Services and Trade related Issues in EPAs

The Cariforum-EC EPA: An Analysis of its Government Procurement and Competition Law-Related Provisions – Working Paper –

2008

gtz

commissioned by



Federal Ministry
for Economic Cooperation
and Development

Publisher:

Deutsche Gesellschaft für
Technische Zusammenarbeit (GTZ) GmbH
Dag-Hammarskjöld-Weg 1-5
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This study has been commissioned by GTZ on behalf of the German Federal Ministry of Economic Cooperation and Development (BMZ), Germany. The views expressed in this study are those of the authors only and should not be attributed to BMZ and GTZ.

Abstract:

Proposals to include provisions relating to so-called behind-the-border policies in Economic Partnership Agreements, including those relating to government procurement and competition law, were a source of public controversy and, if the stated positions of negotiators are taken at face value, significant disagreement between the parties concerned. Now that the European Commission, acting on behalf of the EU member states, has initialled an EPA with the Caribbean states there is an opportunity to dispassionately assess the contents and possible effects of provisions relating to behind-the-border policies. Such an assessment is presented here and the implications for the remaining EPA negotiations as well as for Caribbean nations, including the potential impact on subsequent efforts to integrate regional markets, are discussed.

This paper was prepared for Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)².

² The authors thank Regine Qualmann (GTZ) and other experts from both developing and industrialised economies for their thoughtful comments on an earlier draft of this study that was dated 14 May 2008.

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List of Acronyms

ACP	African, Caribbean and Pacific nations
CAR	Central African Republic
CARICOM	Caribbean Community and Common Market
CARIFORUM	Caribbean ACP states
CCC	Community Competition Commission
CCJ	Caribbean Court of Justice
COPROCOM	Comisión para Promover la Competencia, Costa Rica
COTED	Council for Trade and Economic Development
CPC	United Nations Central Product Classification
CRNM	Caribbean Regional Negotiating Machinery
CSME	CARICOM Single Market and Economy
DR	Dominican Republic
DSM	Dispute Settlement Mechanism
EAC	East African Community
EC	European Commission
EFTA	European Free Trade Agreement
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
GPA	WTO Government Procurement Agreement
INDOTEL	Instituto Dominicano de las Telecomunicaciones, Dominican Republic
RTA	Regional Trade Agreement
RTC	Revised Treaty of Chaguaramas
SA	Republic of South Africa
SADC	Southern African Development Community
SDR	Special Drawing Right
TDCA	Trade, Development Cooperation Agreement
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 Introduction

The negotiation of Economic Partnership Agreements (EPAs) between the European Union (EU) and some of the world's smallest and most vulnerable countries, many of which were former colonies of European states, has been both protracted and a source of considerable controversy within and outside Europe. This has had adverse consequences for broader EU external relations policy. These considerations added further impetus to concluding these negotiations, which were necessary once a World Trade Organization (WTO) waiver expired concerning the EU's extant preferential trading arrangements with the African, Caribbean, and Pacific nations (ACP). Notwithstanding this, the EPAs are claimed to represent an important element in the EU's trade and development policies. As such they can be seen as a manifestation of Europe's collective desire to promote living standards in poorer countries and to facilitate their integration into the world trading system as well as into their respective regional economies.

An important milestone was reached on 16 December 2007 when the European Commission (EC) initialled an EPA with 15 Caribbean economies, the so-called CARIFORUM group³. Naturally governments, civil society, business, and other interested parties are keen to assess both the contents as well as the likely effects of the CARIFORUM-EC EPA. This paper characterises and assesses the government (public) procurement and competition law-related provisions of the CARIFORUM-EC EPA. In so doing, it seeks to contribute to the debate over the relative merits of this regional trade agreement (RTA), at least with respect to these two particular government policies.⁴ To this end, the paper identifies some policy options for those EPA negotiations between the EC and other ACP countries that have yet to reach a similar milestone.

Given the conditions of competition within a developing economy and the budgetary pressures faced by many governments, central and sub-national, in many poorer countries it should not be surprising that competition and public procurement policies can have important consequences for the availability and prices of goods and services in poorer countries. What has been contentious, however, not only in the context of the EPA negotiations but RTA negotiations more generally as well as in deliberations at the WTO, is whether trade agreements should include provisions on certain behind-the-border matters such as government procurement policies and competition law. The debate of particular interest to this paper is whether provisions on these policies in trade agreements could contribute to the development of poorer countries.

This paper is organised into two major substantive sections: one relating to government procurement policies and the other to competition law. These sections are followed by concluding remarks. Each substantive section proceeds from the general to the specific. That is, first, each section summarises the policy findings of the available research on the potential developmental consequences and experience with the class of RTA provisions in question. Next, the relevant provisions of the CARIFORUM-EC EPA are discussed in some detail and compared to similar provisions in other recent RTAs. An assessment of the CARIFORUM-EC EPA provisions follows, including consideration of the possible impact on regional integration of certain markets within the Caribbean region. Finally, policy options for the other ongoing EPA negotiations are described.

During the course of the analysis for this paper, interviews and opinions of relevant experts and civil society actors were sought. The substantive comments and criticisms gleaned from this dialogue have been addressed in the revisions of this paper. The authors would like to particularly thank Robert Anderson (WTO Counsellor), Dr Taimoon Stewart (UWI), Jan Wimaladhama (DFID Caribbean) for their input and interest, although the final paper reflects the views of the authors alone.

³ Antigua And Barbuda, The Commonwealth Of The Bahamas, Barbados, Belize, The Commonwealth Of Dominica, The Dominican Republic, Grenada, The Republic Of Guyana, The Republic Of Haiti, Jamaica, Saint Christopher And Nevis, Saint Lucia, Saint Vincent And The Grenadines, The Republic Of Suriname, The Republic Of Trinidad And Tobago.

⁴ No attempt is made here to evaluate other government policies, whether they be directly border-related (such as tariffs) or have indirect effects on commerce.

2 The public procurement provisions of the CARIFORUM EPA

As noted in the introduction, the contents of this section proceeds from the general to the specific. First, what is known about the development impact of government procurement provisions in trade agreements, including regional trade agreements, is discussed. Then a legal analysis of the procurement-related provisions of the CARIFORUM EPA is presented. Finally, some observations on the specific impact of these provisions, including on the potential for further integrating economies in the Caribbean region, are discussed.

2.1 Development implications of the government procurement provisions in trade agreements

The price and quality of state purchases can have significant implications for the poor in developing countries. When few firms compete for state contracts the prices paid by public bodies tend to be higher than they need to be and--with fixed budgetary allocations--the quantity of goods bought is reduced. This argument applies to medicines and school books as well as to large scale projects such as hospital and school construction. Worse, when government procurement practices are distorted by corruption even fewer resources end up reaching end-users and the poor suffer. Designing a state procurement system in which potential suppliers have the confidence to bid (because they don't expect corruption or idiosyncratic discrimination), where value-for-money, safety, and environmental state objectives are met, and where national populations receive the public services they need is an important developmental priority. The question arises as to how to accomplish these goals and what constructive role EPAs and other RTAs might play. The history of national reform efforts in public purchasing is, for the most part, a sad one. Vested interests--commercial, bureaucratic, and political--often conspire to doom the implementation of reform measures or to prevent them being put forward in the first place (Hunja 2003).⁵ External interventions by the World Bank and International Monetary Fund--often in the form of conditionality for loans received--do not have an impressive track record either. Initiatives need to be identified that fundamentally alter the long term balance of interests within a country in favour of public procurement reform. Sometimes scandals relating to state purchasing provide the impetus for reform, but the frequency of these scandals cannot be counted on to improve matters. Another option is to use trade agreements, which draw in a wider range of interested parties than those typically associated with a public procurement process, to shift the incentives away from closed, corrupt procurement systems to open, transparent, and competitive alternatives. In this regard it is noteworthy that there is a plurilateral WTO agreement on government procurement but its membership is principally limited to industrialised countries. A United Nations (UN) accord on procurement matters (lodged at United Nations Commission on International Trade Law -- UNCITRAL) is a soft-law alternative, but its non-binding nature probably limits its impact. What can be accomplished in principle in EPAs and RTAs?

Turning to the effects of potential procurement provisions in RTAs it is appropriate to distinguish between those provisions that seek to limit discrimination against foreign bidders and those that seek to improve the transparency of national procurement regimes. The former include measures to limit the de jure or de facto bans on foreign bidding, measures to limit the use of price preferences (which inflate the magnitude of foreign bids before they are compared with the bids of domestic firms), and measures that make it harder or more costly for foreign bidders to meet any requirements for suppliers (such as health and safety requirements) to qualify to bid or to bid in the first place. Indeed, the last point suggests that

⁵ It would be wrong to suggest that these vested interests are necessarily corrupt, many could be the recipient of favours from governments that are known and accepted by much of society.

certain procurement regulations may at first glance look innocent or even noble, but their effects could be to substantially discriminate against foreign firms.

Research findings concerning the development impact of provisions that limit discrimination in procurement markets tend to focus more on arguments made from first economic principles and less on statistical studies of their impact. Moreover, the evidence that is available tends to relate to the experience of industrialised countries (see Bourgeois, Dawar, and Evenett 2007). When it comes to first principles, an important finding is that bans on procurement discrimination will only lead to greater imports from foreign suppliers under a narrow set of circumstances. Only when the domestic industry is completely dependent on the government as the buyer of the goods that it produces for the domestic market, and the price paid by the government exceeds the price paid by domestic private customers to import the same product, will the elimination of procurement discrimination against foreign firms result in greater imports (Baldwin 1970, Baldwin and Richardson 1972). This longstanding research finding was first demonstrated for government purchases in competitive markets and has been validated in many other market structures since.⁶

When governments buy goods through procurement auctions, the removal or reduction of procurement discrimination can have different effects. Simulations of procurement auctions have shown that less discrimination against foreign bidders (perhaps in the form of lower price preferences or allowing more foreign firms to bid in the first place) reduce both the probability that any domestic firm wins the state contract in question and the profit margin should they do so. Interestingly, foreign bidders tend to respond to lower price preferences by raising their prices and profit margins and, when there are a small number of domestic and foreign bidders in total, total procurement costs paid by the government fall only a little (Evenett and Deltas 1997). Other simulations have shown that the biggest falls in state procurement costs occur when the total number of domestic and foreign bidders rises from a very small number (two or three) to five or more bidders (Deltas and Evenett 1997, McAfee and McMillan 1990). These findings suggest that procurement provisions in EPAs and RTAs which induce more foreign bidders are likely to generate the greatest improvements in value-for-money for governments and enable them to spread their budgets further across their needy populations.

The research findings on improving the transparency of state procurement processes are interesting (for a summary see Evenett and Hoekman 2005). Greater clarity in the terms and conditions for applying for state procurement contracts attracts larger numbers of both domestic and foreign firms to bid. Small and medium sized enterprises, which governments often seek to promote in both developing and industrialised countries, appear to be particularly responsive to increases in procurement-related transparency⁷. The overall impact, then, is to tend to reduce the average size of firms bidding for state contract. The impact on imports however, is mixed, precisely because more domestic firms bid for state contracts too and some will win them. This casts doubt on any presumption that transparency-improving provisions in EPAs necessarily increase imports and are a back door way to improving market access to developing country markets.

According to experts on corruption improvements in transparency which have the effect of discouraging extra-legal payments to state officials also result in a shift in state spending away from highly differentiated products such as aircraft (where cross-product price comparisons are more difficult and where corruption can flourish) towards more homogenous

⁶ It should also be noted that when governments reduce discrimination against foreign sellers to their procurement markets on a preferential basis then the long-standing concerns about trade diversion--which can arise in all goods markets not just procurement markets--are pertinent here. Specifically, trade diversion is said to occur when the reduction or elimination of discrimination on preferential basis induces buyers (in this case state purchasers) to shift from those foreign producer or producers with the lowest production costs to foreign producers that have higher costs (but are the beneficiary of the implied preference generated by the RTA's creation.) For over 50 years economists have accepted that trade diversion reduces the welfare of the purchasing nation.

⁷ In a paper written for a Northern NGO on the government procurement provisions in the CARIFORUM EPA (and therefore of direct relevance to the material contained in this paper), Woolcock (2008a) contends that "it is not clear that smaller developing countries can reap similar gains" from improving the transparency of procurement processes. Readers may want to bear in mind that Woolcock offers no empirical evidence to support this contention.

goods (where it is more evident when the state is overpaying for a good)⁸. Overall, transparency improvements tend to have a variety of effects, many of which are of direct benefit to developing countries.

Any discussion of the impact of transparency provisions would be incomplete, however, without an acknowledgement of the resource costs that are often associated with publishing changes in procurement practices and publishing statistics on procurement decisions. Moreover, the benefits of greater transparency to potential bidders for state contracts are probably maximised when additional steps are taken to ensure due process and to challenge the decisions of procuring entities. The latter too can involve expense and expertise. A balanced perspective is needed here as the benefits of transparency, due process, and rights of appeal are enjoyed by potential domestic bidders for state contracts, not just foreign firms. To the extent that more of the former are encouraged to bid for state contracts then the procurement cost reductions that follow may defray all or part of any additional administrative costs. Plus, it should be remembered that these additional costs are typically spread across a country's entire state procurement system and the cost per state purchase may well be very low. These arguments apply with as much force to developing and least developed countries as they do to other jurisdictions.

Scholarly research on the effects of public procurement policies does (indirectly at least) speak to another matter that is often liberally used in discussions on trade agreements and development, namely "policy space." There appears to be no accepted definition of this latter term (which in and of itself should be a warning to careful policy analysts). However, in the context of government procurement policies some have associated "policy space" with the use of "preferential procurement for development or infant industry strategies" (Woolcock 2008b, page 15). As a matter of economic theory, there are indeed some circumstances under which preferential procurement policies can expand the output (but not necessarily the profits) of domestic industry (see the summary tables in Evenett and Hoekman 2005). However, what is remarkable is that we could find no empirical evidence in those papers critical of the inclusion of public procurement provisions in the EPAs (such as Woolcock 2008a,b). Surely, if such policy space were so crucial to development prospects then with all the money spent by developmental organisations, NGOs, and aid ministries on commissioning work on the EPAs then someone would have found evidence that preferential procurement policies met the following three criteria: (i) effectively attained stated development goals (over the longer term and, therefore, not temporarily), (ii) delivered benefits in excess to society of any costs (such as higher prices paid by government buyers and therefore fewer goods and services, such as medicines and school textbooks, available to the poor), and (iii) that these policies were indispensable, that is, there is no other government measure that could attain the same development goals at lower societal cost? Only then would it be possible to start making an evidence-based case for excluding preferential procurement policies from EPAs. Even if at some future point in time the available research enables such a case to be made, it would not necessarily imply that measures to improve the transparency of procurement processes should be excluded from trade agreements too. Given the paucity of evidence supporting the use of preferential procurement policies in developing countries--and certainly the failure to meet the three criteria articulated above--decision-makers in developing economies should be under no illusion that the concept of "policy space" as it relates to public procurement policies has no sound foundation in empirical research on their countries.

⁸ The research findings in this respect are also summarised in Evenett and Hoekman (2005).

2.2 Legal Analysis of the CARIFORUM-EPA Provisions Relating to Public Procurement

2.2.1 Introduction

This section analyses the structure and content of the legal provisions of the CARIFORUM EPA relating to government / public procurement. It provides a textual analysis of the legal obligations regulating public procurement and, where possible, provides a comparative assessment of equivalent provisions with different other trade agreements including the WTO Government Procurement Agreement (GPA). The GPA is a plurilateral agreement, meaning that not all Members of the WTO are bound by it.

Table 1 below provides an overview of the main elements that can be identified within the rubric of public procurement regulation, although clearly not all of these elements are negotiated within a trade agreement. The following analysis divides these relevant legal provisions into two main categories depending on whether they are seeking to reduce discrimination against foreign suppliers or whether the provisions seek to set standards among the parties to the agreement. The latter includes the right to regulate at the domestic level; any exceptions and measures concerned with regulating potential conflicts with obligations arising from other international agreements; and provisions providing for cooperation between parties. Provisions can vary, of course, in the degree to which they actually bind signatories.

To assess the strength or ‘bite’ of the obligation, an examination is also made of the dispute settlement mechanism(s) provided by the agreement to underpin the relevant provisions, including identifying any remedies it may provide to an aggrieved Party. This should identify whether the provisions governing the Dispute Settlement Mechanism (DSM) are closer to what John Jackson has termed the ‘power-oriented’ or ‘diplomatic’ approach or to the ‘rule-oriented’ approach (Jackson 2000). The former includes, for example, mediation and consensus based conflict resolution, while the latter implies binding decisions based on non-negotiable legal obligations, such as in the GATT/WTO System. A binding DSM offers greater legal certainty and clarity than the more diplomatic routes. It is not possible for stronger parties to a dispute to disregard the outcome or to refuse to enter into dispute resolution when a weaker party is the complainant. However, if a weaker party has a poor record of implementing its trade obligations, it may prefer a less binding DSM on the grounds that it may be able to use diplomacy to gain greater concessions in implementation.

2.2.2 An overview of the CARIFORUM EPA chapter on Public Procurement

The CARIFORUM Economic Partnership Agreement was initialled between the CARIFORUM States⁹ and the European Community and its Member States. The Public Procurement provisions fall under Chapter 3 of Title IV covering Trade Related Issues. The chapter begins by recognising the importance of transparent competitive tendering for economic development, with due regard being given to the special situation of the economies of the CARIFORUM States. With further reference to Table 1 above, The Cariforum Public Procurement chapter includes articles concerning the following matters: Definitions; Scope; Transparency; Methods of Procurement; Selective Tendering; Rules of Origin; Technical Specifications; Qualification of Suppliers; Negotiations; Opening of Tenders /Awarding Contracts; Information on Contract Awards; Time Limits; Bid Challenges; Implementation Periods; Review Clauses; and Cooperation. The following sub-sections examine the most important legal issues arising from the provisions in this chapter.

⁹ Antigua And Barbuda, The Commonwealth Of The Bahamas, Barbados, Belize, The Commonwealth Of Dominica, The Dominican Republic, Grenada, The Republic Of Guyana, The Republic Of Haiti, Jamaica, Saint Christopher And Nevis, Saint Lucia, Saint Vincent And The Grenadines, The Republic Of Suriname, The Republic Of Trinidad And Tobago.

2.2.3 Legal Textual Analysis of Public Procurement Provisions

2.2.3.1 The agreement's preambles and objectives

This sub-section identifies whether the subject matter under analysis is explicitly related to the overall trade obligations of the EPA parties or not. The preamble does not contain any binding obligations upon the Parties; the statements are not intended to be operative provisions in the sense of creating specific rights or obligations. Rather a preamble is designed to establish a definitive record of the intention or purpose of the Parties in entering into the agreement, which can inform or 'colour' the interpretation of a treaty provision. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides that the preamble forms part of the treaty text and, as such, part of the terms and 'context' of the treaty for purposes of interpretation. The Appellate Body of the WTO has also emphasised on several occasions that Article 31 VCLT is a fundamental reference point for WTO dispute settlement. The preamble of the CARIFORUM EPA (or any other treaty) may therefore be used as a source of interpretative guidance by government officials and judges in the process of implementation and dispute settlement.

The preamble to the overall CARIFORUM EPA does not contain any statement referring to public procurement. This is the case for many RTAs. In one study of public procurement provisions in 27 RTAs, none referred in its preamble to public procurement explicitly (Bourgeois, Dawar, and Evenett 2007). However, some broad statements could be understood as implicitly covering public procurement.

In the CARIFORUM EPA as noted above, Article 165 of the Public Procurement chapter states that the general objective of the procurement chapter is as follows:

CARIFORUM EPA Article 165: General Objective

The Parties recognize the importance of transparent competitive tendering for economic development with due regard being given to the special situation of the economies of the CARIFORUM States.

This objective is narrow not only because it is the sole objective, but also because it merely 'recognises' the importance of this issue and does not set out any further prescriptive objective. Moreover, while it does explicitly mention the 'special situation' of the CARIFORUM states, nowhere is this phrase defined within the treaty.

2.2.3.2 The scope of obligations for government procurement

The scope of the subject matter of value to this analysis includes the types of rights and obligations to be covered by the agreement and whether these rights will be based on national or international standards. The scope of the CARIFORUM EPA public procurement provisions are set out in Article 167 of the CARIFORUM EPA and can be said to be relatively narrow.

The CARIFORUM EPA does not contain explicitly substantive provisions on how the eligibility for public procurement is determined. They only obligate the parties to ensure that the procurement of their procuring entities takes place in a transparent manner according to the procedural provisions of the CARIFORUM EPA Article 168.

CARIFORUM EPA. Article 168 Transparency of government procurement

1. Subject to Article 180(4), each Party or Signatory CARIFORUM State shall promptly publish any law, regulation, judicial decision and administrative ruling of general application, and procedures, regarding procurement covered by this Chapter, as well as individual procurement opportunities, in the appropriate publications referred to in Annex 7 including officially designated electronic media. Each Party or Signatory CARIFORUM State shall

promptly publish in the same manner all modifications to such measures, and shall within a reasonable time inform each other of any such modifications.

2. The Parties and the Signatory CARIFORUM States shall ensure that their procuring entities provide for effective dissemination of the tendering opportunities generated by the relevant government processes, providing eligible suppliers with all the information required to take part in such procurement. Each Party shall set up and maintain an appropriate on-line facility to further the effective dissemination of tendering opportunities.

(a) Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders.

(b) Where entities do not offer free direct access to the entire tender documents and any supporting documents by electronic means, entities shall make promptly available the tender documentation at the request of any eligible supplier of the Parties.

3. For each procurement covered by this Chapter, procuring entities shall, save as otherwise provided, publish in advance a notice of intended procurement. Each notice shall be accessible during the entire time period established for tendering for the relevant procurement.

4. The information in each notice of intended procurement shall include at least the following:

(a) name, address, fax number, electronic address (where available) of the procuring entity and, if different, the address where all documents relating to the procurement may be obtained;

(b) the tendering procedure chosen and the form of the contract;

(c) a description of the intended procurement, as well as essential contract requirements to be fulfilled;

(d) any conditions that suppliers must fulfil to participate in the procurement;

(e) time-limits for submission of tenders and, where applicable, any time limits for the submission of requests for participation in the procurement.

(f) all criteria to be used for the award of the contract; and

(g) if possible, terms of payment and other terms.

5. Procuring entities are encouraged to publish as early as possible in each fiscal year a notice regarding their future procurement plans. The notice should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.

6. Procuring entities operating in the utilities may use such a notice regarding their future procurement plans as a notice of intended procurement provided that it includes as much of the information set out in paragraph 4 as available and a statement that suppliers should express their interest in the procurement to the entity.

The eligibility criteria for participating in a government tender is not regulated within this chapter. Article 169 aims to ensure that this decision making capacity remains with the state. These provisions only obligate parties to ensure that their policies are made transparent.

CARIFORUM EPA. Article 169 Methods of procurement

1. Without prejudice to the method of government procurement used in respect of any specific procurement, procuring entities shall ensure that such methods are specified in the notice of intended procurement or tender documents.

2. The Parties or the Signatory CARIFORUM States shall ensure that their laws and regulations clearly prescribe the conditions under which procuring entities may utilise limited tendering procedures. Procuring entities shall not utilise such methods for the purpose of restricting participation in the procurement process in a non-transparent manner.....

Even though the EPA public procurement provisions do not obligate CARIFORUM parties to open their procurement markets to another CARIFORUM or EC party, there is nothing to prevent their national laws stipulating that their public procurement policies are based on non-discrimination and national treatment. This is in contrast to the basis of the WTO's GPA, which the EC has signed up to. The GPA embodies guarantees of national treatment and

non-discrimination for the goods, services, and suppliers of those governments that are party to the Agreement and with respect to procurement of covered goods, services, and construction services set out in each Party's schedules. Moreover, during the negotiations to revise the coverage of the GPA, the EC advocated a significant expansion of other Parties' coverage and reduction of exclusions and derogations embodied in their schedules (Anderson 2007).

While this EPA's public procurement provisions do not prevent the Caribbean Community and Common Market (CARICOM) countries from discriminating between the nationality of suppliers, signatories are encouraged to apply non-discrimination principles in state purchases through the use of the word 'endeavour' in Article 167.1:

CARIFORUM EPA. Article 167.1 - Supporting the Creation of Regional Procurement Markets

1. The Parties recognize the economic importance of establishing competitive regional procurement markets.
2. (a) With respect to any measure regarding covered procurement, each Signatory CARIFORUM State, including its procuring entities, shall endeavour not to treat a supplier established in any CARIFORUM State less favourably than another locally established supplier.
- (b) With respect to any measure regarding covered procurement, the EC Party and the Signatory CARIFORUM States, including their procuring entities:
 - (i) shall endeavour not to discriminate against a supplier established in either Party on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of either Party;
 - (ii) shall not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation to or ownership by operators or nationals of any Signatory CARIFORUM State or of the EC Party.
3. Subject to paragraph 4 below, each Party, including its procuring entities, shall with respect to any measure regarding covered procurement, accord to the goods and services of the other Party and to suppliers of the other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers.
4. The Parties shall not be required to provide the treatment envisaged in paragraph 3 unless a decision by the Joint CARIFORUM-EC Council to this effect is taken. That decision may specify to which procurements by each Party the treatment envisaged in paragraph 3 would apply, and under which conditions.

Article 167.1.1 recognises that, while these countries have different developmental needs and abilities, the Caribbean countries are anyway moving towards the establishment of the CARICOM Single Market and Economy (CSME) Public Procurement regime as well as including a public procurement protocol within the CARICOM-Dominican Republic (CARICOM-DR) Free Trade Agreement. The Caribbean Regional Negotiating Machinery (CRNM) has stated that the public procurement thresholds that were finally agreed upon in the CARIFORUM EPA are not only the highest in existing bilateral trade agreements but are also limited in covering Central Government procurement only, which is less than the EC's coverage.

Nevertheless, the EPA does commit signatories to avoiding discrimination against one form of foreign supplier in public procurement procedures and allows for further steps to be taken against discriminatory practices. With respect to the former, the use of the language 'shall not treat' in Article 167.1.2.ii is significant. This amounts to an obligation not to discriminate against foreign companies that have a commercial presence in a CARIFORUM State and as such qualify as a domestic company for public procurement bids. Furthermore, Articles 167.1.3 and 167.1.4 can be seen as a 'built in agenda' to implement national treatment in state purchases at some point in the future, should the parties to this EPA agree to do so.

In Article 168 covering transparency of public procurement each Party is obligated through the use of the word 'shall' to promptly publish and effectively disseminate in a timely manner, any relevant law, information, decision or modification regarding procurement in explicitly listed publications. Again, these transparency requirements do not affect the method of public procurement policy followed at a national level.

Indeed, as noted above, Article 169 obligates the parties only to ensure that their laws and regulations clearly set out the conditions for limited tendering procedures that procuring entities may follow with the overall objective of preventing parties from using restricting procurement eligibility in a non-transparent manner; this is absolutely 'without prejudice' to their chosen method of public procurement.

Individual CARIFORUM parties may have highly selective eligibility criteria for public contracts bids - as long as these limited tendering procedures are made publicly known under the conditions set out in Article 171 of the EPA. These conditions are the same as those negotiated for the CSME public procurement regime and are informed by international standards and best practices. This is necessarily so, for if either the EPA or CSME conditions for limited tendering were either more stringent or more flexible than the other, it could undermine the relevant provisions of both agreements.

The exceptions to these obligations are broad, especially when compared with the WTO GPA:

CARIFORUM EPA Article 167.3 - Exceptions

1. Nothing in this Chapter shall be construed as preventing a Signatory CARIFORUM State or the EC Party from imposing or enforcing measures relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.

2. This Chapter does not apply to:

- (a) the acquisition or rental of land, existing buildings, or other immovable property or the rights thereon;
- (b) non-contractual agreements or any form of assistance that a Party or Signatory CARIFORUM State provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;
- (c) the procurement or acquisition of fiscal agency or depositary services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
- (d) the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time;
- (e) arbitration and conciliation services;
- (f) public employment contracts;
- (g) research and development services;
- (h) the procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes, including food aid;
- (i) intra-governmental procurement;
- (j) procurement conducted:
 - (i) for the direct purpose of providing international assistance, including development aid;
 - (ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation of a project by a Party or Signatory CARIFORUM State with a non-Party;
 - (iii) in support of military forces located outside the territory of the Party or Signatory CARIFORUM State;
 - (iv) under the particular procedure or condition of an international organisation, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with this Chapter.

WTO GPA. Article III Exceptions to the Agreement

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition, or war materials, or to procurement indispensable for national security or for national defence purposes.
2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:
 - (a) necessary to protect public morals, order, or safety;
 - (b) necessary to protect human, animal or plant life or health;
 - (c) necessary to protect intellectual property; or
 - (d) relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.

More generally, the WTO GPA plurilateral agreement's core principles go further than the CARIFORUM EPA to include both transparency and non-discrimination. The national treatment provision obligate each party to provide to goods, services, and suppliers of any GPA party treatment 'no less favourable' than the treatment provided to domestic goods, services, and suppliers. To ensure proper access to procurement, the GPA lays down a series of detailed rules on tendering procedures, documentation and technical specifications, deadlines for the preparation, submission and receipt of tenders, and rules on post-contract information and publication. Like the CARIFORUM EPA, the GPA obligations apply only to procurements by entities which are listed in Annexes, of goods and of all services which are also listed in Annexes (following the 'positive list' system) and in relation to contracts which exceed certain monetary thresholds. Each party to the GPA is allowed to set, modify or rectify the coverage of the agreement on its own, provided it follows due process.

For reference, the appendix to this paper lists the entities that parties to the CARIFORUM EPA have agreed shall be covered by the procurement chapter. Although the budgets and responsibilities of ministries across the CARIFORUM countries certainly differ, the diversity of state purchasers covered by the EPA's procurement chapter is striking. The EC has included in its covered entities the same public purchasing bodies that it maintains obligations on under the WTO GPA.

A comparative study of the public procurement provisions in 27 RTAs indicated that certain agreements exclude de plano certain sectors (e.g. the EU-Chile RTA and the European Free Trade Agreement (EFTA) States-Chile RTA both exclude, among others, financial services) or certain contracts (e.g. Dominican Republic-Central American countries-United States (US); US-Bahrain; US-Jordan; US-Morocco; US-Oman; US-Peru; US-Singapore RTAs). Moreover, the New Zealand-Singapore RTA refers to schedules of commitments only for services but is intended to apply across the board to public procurement of goods (Bourgeois, Dawar, and Evenett 2007).

2.2.3.3 Institutions and agencies

Part V of the CARIFORUM-EC EPA establishes four institutions, of which the highest body - the Joint CARIFORUM-EC Council - and the CARIFORUM-EC Trade and Development Committee are relevant to the implementation of the public procurement chapter. The Joint CARIFORUM EC Council meets at Ministerial level with the mandate of supervising the implementation of the EPA and is vested with normative powers in that it may take decisions concerning any aspect of the agreement which will be binding on the Parties. The CARIFORUM –EC Trade and Development Committee is also responsible for supervising the implementation of the Agreement. It has specific responsibilities including the supervision of the implementation and application of the Agreement, to undertake action to avoid disputes, and to resolve disputes that may arise regarding the interpretation or application of the Agreement, and also, to monitor the implementation of the cooperation provisions laid down in the Agreement.

The CARIFORUM EPA is not unusual in omitting the creation of public procurement specific institutional machinery. The RTAs between EFTA States and Chile; EFTA States and Mexico; Korea and Singapore; US and Australia; US and Bahrain; US and Morocco; US and Oman; US and Peru; US and Singapore; EC and Chile do not create such bodies either. In a comparative study of 27 recent RTAs, a wide variety of formulas in relation to institutional cooperation were identified among parties to the RTAs (Bourgeois, Dawar, and Evenett 2007). In some RTAs the parties did not intend to assume significant commitments in relation to public procurement. A good example can be found in the RTA between Thailand and Australia which merely expresses the parties' will to establish a working group with a view to making recommendation to the RTA Joint Commission on the scope of subsequent bilateral negotiations on public procurement. At the other end of the spectrum, the US-Chile RTA, for instance, establishes a "Committee on Procurement", which is in charge of addressing matters related to the implementation of the public procurement commitments assumed by the parties.

Consistent with the apparent emphasis on preserving Member State "policy space" in setting out public procurement eligibility criteria, it is perhaps not surprising that the CARIFORUM EPA provisions do not obligate the parties to create regional or national institutions or agencies to implement the chapter. However, per Article 181 the CARIFORUM-EC Trade and Development Committee are obligated to review the operation of this Chapter every three years. Again, this allows for a built-in agenda to arise and for new procurement provisions of mutual interest to the parties to be negotiated.

CARIFORUM EPA. Article 181 Review clause

The CARIFORUM-EC Trade and Development Committee will review the operation of this Chapter every three years, including with regard to any modifications of coverage, and may make appropriate recommendations to the Joint CARIFORUM-EC Council to that effect, as appropriate. In carrying out this task, the CARIFORUM-EC Trade and Development Committee may, without prejudice to Article 182, also make appropriate recommendations regarding the Parties' further cooperation in the procurement field and the implementation of this Chapter.

2.2.3.4 The Dispute Settlement Mechanism (DSM)

The CARIFORUM EPA public procurement provisions set out procedures covering bid challenges in Article 179. Here the parties are obligated to provide transparent, timely, impartial, and effective procedures enabling affected suppliers to challenge domestic measures in the context of covered procurement. Importantly, the measures to be taken to correct breaches in the accord are not specified in Article 179. Nor is the amount of compensation available to aggrieved parties specified. As will become clear, compared to other RTAs, these are significant omissions.

CARIFORUM EPA. Article 179 Bid Challenges

1. The Parties and the Signatory CARIFORUM States shall provide transparent, timely, impartial and effective procedures enabling suppliers to challenge domestic measures implementing this Chapter in the context of procurements in which they have, or have had, a legitimate commercial interest. To this effect, each Party or Signatory CARIFORUM State shall establish, identify or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of covered procurement.

2. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge as from the time when the basis of the challenge become known or reasonably should have become known to the supplier. This paragraph does not preclude Parties or Signatory CARIFORUM States from requiring complainants to lodge their complaints within a reasonable period of time provided that duration of that period is made known in advance.

3. Procuring entities shall ensure their ability to respond to requests for a review by maintaining a reasonable record of each procurement covered under this Chapter.
4. Challenge procedures shall provide for effective rapid interim measures to correct breaches of the domestic measures implementing this Chapter.

As a point of reference, a comparative study of relevant RTA provisions identified widespread use of bid challenge systems to allow suppliers taking part in a tender to challenge contracts, which they consider having been awarded in breach of procurement rules (Bourgeois, Dawar, and Evenett 2007). The degree of sophistication of these systems varied although most provided for a degree of detail in their rules more or less equivalent to the WTO GPA. Probably the most comprehensive provision in this regard is Article 125 of the Economic Partnership Agreement between Japan and Mexico, which is reproduced directly below.

Japan – Mexico RTA. Article 125

1. In the event of a complaint by a supplier that there has been a breach of this Chapter in the context of a government procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.
2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of this Chapter arising in the context of government procurements in which they have, or have had, an interest.
3. Each Party shall provide its challenge procedures in writing and make them generally available.
4. Each Party shall ensure that documentation relating to all aspects of the process concerning government procurements covered by this Chapter shall be retained for 3 years.
5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.
6. A Party may require that a challenge procedure be initiated only after the notice of procurement has been published or, where a notice is not published, after tender documentation has been made available. Where a Party imposes such a requirement, the 10 day period described in paragraph 5 above shall begin no earlier than the date that the notice is published or the tender documentation is made available.
7. Challenges shall be heard by an impartial and independent reviewing authority with no interest in the outcome of the government procurement and the members of which are secure from external influence during the term of appointment. A reviewing authority which is not a court shall either be subject to judicial review or shall have procedures which provide that:
 - (a) participants can be heard before an opinion is given or a decision is reached;
 - (b) participants can be represented and accompanied;
 - (c) participants shall have access to all proceedings;
 - (d) proceedings can take place in public;
 - (e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
 - (f) witnesses can be presented; and
 - (g) documents are disclosed to the reviewing authority.
8. Challenge procedures shall provide for:
 - (a) rapid interim measures to correct breaches of this Chapter and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures

should be applied. In such circumstances, just cause for not acting shall be provided in writing;

(b) an assessment and a possibility for a decision on the justification of the challenge; and

(c) where appropriate, correction of the breach of this Chapter or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

9. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.

While the CARIFORUM EPA bid challenging procedures are narrower than the Japan-Mexico RTA, the former are open to private parties that have participated in bidding for a state contract and have some grievance or matter they wish to raise. Bidders for state contracts, therefore, do not as a first resort have to go to their respective governments to initiate formal dispute settlement procedures.

In a comparative study of procurement provisions in recent RTAs nearly all the agreements examined contain dispute settlement provisions for disagreement arising between the two contracting parties (Bourgeois, Dawar, and Evenett 2007). Very few RTAs provide for specific dispute settlement systems for discord arising between parties in relation to public procurement. Specific dispute settlement systems for public procurement are foreseen in Chapter 9 of the EFTA States-Korea RTA, Chapter 15 of the Economic Partnership Agreement between Japan and Mexico, and Chapter 16 of the Singapore-Australia Free Trade Agreement. Only five of the 27 RTAs avoided mention of any public procurement-related provisions, although a further four confined their public procurement provisions to institutional matters. The US agreements signed under the Bush Administration have included an extensive range of public procurement provisions, strongly suggestive of a greater level of ambition on the part of US trade policymakers.

The general (that is, not government procurement chapter-specific) CARIFORUM EPA dispute settlement mechanism (DSM) includes consultation, mediation, and dispute settlement panel procedures to ensure that disputing parties try to resolve their conflicts in consultation without the need to establish an arbitration panel. In areas where the capacity to accept collective obligations currently exists or has been contemplated, the CARIFORUM States have agreed to accept collective obligations. In areas where there is no existing or planned regional competence the CARIFORUM states are individually responsible for implementing the provisions of the agreement at the national level. Further, if a CARIFORUM State fails to comply with the obligations of the EPA, the EC is entitled to retaliate, but only against the non-compliant CARIFORUM State.

2.2.4 Assessment of the Interim EPA Public Procurement Provisions

Table 1 compares the provisions that have been included in five Interim EPAs that have currently initialled by the EU and the Pacific; Central African Republic; East African Community; SADC; ESA; alongside the EC-South Africa 2001 TDCA.

As Table 1 indicates, the Interim EPA initialled by the CAR is the most detailed to date. The text sets out the date for concluding future negotiations on public procurement, which is 1/1/2009. While the ESA and EAC texts contain 'rendezvous clauses' for negotiating government procurement provisions, no date has been set. None of the other interim EPAs reference government procurement, except within the National Treatment and / or Security Exceptions. Here all the texts include government procurement under both or only the latter provision.

The implications of this is that only the ESA, EAC and CAR EPA negotiations need include government procurement in any eventual EPA agreement. Of these, only the CAR text sets out the potential scope of the EPA government procurement chapter. Article 59 states that negotiations will include transparency and non discriminatory rules and procedures, the coverage of the provisions, conflict resolution and technical assistance. The negotiations will first look at the application of these rules in the context of regional integration before and only after a jointly pre-determined transition period, will these rules be applied on a bilateral level.

The distinct and special needs of the African signatories will be taken into account during the negotiations and if necessary through specific implementation periods and the adoption of transitional compensatory measures.

Chapitre 4 Marchés publics: Article 59 Poursuite des négociations dans le domaine des marchés publics

1. Les parties reconnaissent que des règles transparentes et concurrentielles d'appel d'offre contribuent au développement économique. Elles conviennent donc de négocier l'ouverture progressive et mutuelle de leurs marchés publics tout en reconnaissant leurs différences de développement, dans les conditions définies au paragraphe 3 de cet Article.
2. Pour atteindre cet objectif, les parties concluront avant le 01/01/2009 des négociations sur une série d'engagements éventuels sur les marchés publics qui concerneront notamment les points suivants:
 - (a) règles transparentes et non discriminatoires, procédures et principes à appliquer ;
 - (b) listes des produits couverts ainsi que seuils appliqués ;
 - (c) procédures efficaces de contestation ;
 - (d) mesures pour soutenir les capacités de mise en oeuvre de ces engagements, y inclus l'utilisation des opportunités offertes par les technologies de l'information.
3. Les négociations seront basées sur une approche en deux étapes, visant d'abord à appliquer les règles dans le contexte de l'intégration régionale en Afrique centrale et, après une période de transition déterminée conjointement, appliquer les règles au niveau bilatéral.
4. Au cours des négociations, la partie CE prendra en compte les besoins en développement, financiers et commerciaux des États signataires de l'Afrique centrale, ce qui pourra se traduire par les mesures suivantes dans l'intérêt du traitement spécial et différencié :
 - (a) Si nécessaire, périodes de mise en oeuvre appropriées pour mettre les mesures gouvernementales de marché public en conformité avec toute obligation procédurale spécifique.
 - (b) Adoption ou maintien de mesures transitionnelles telles que des programmes de prix préférentiels ou compensation, en accord avec un calendrier d'élimination.

The CAR Interim Agreement can usefully be compared to the SADC provision covering both competition and public procurement policies. For the former, while special and differential treatment in the form of transitional periods and compensatory mechanisms are built into any future agenda, it still has the explicit long term objective of introducing transparent and non-discriminatory rules for public procurement. The SADC provision merely states that the EC party will cooperate in building adequate capacity before any negotiations take place.

SADC Title III: Competition and Government Procurement

1. The EC Party agrees to cooperate with a view to strengthening regional capacity in these areas. Negotiations will only be envisaged once adequate regional capacity has been built.

The EC-SA TDCA is a cooperation provision to ensure transparent, fair and equitable rules in public procurement. However beyond a requirement for a periodic review of progress in this cooperation, there is little detailed or explicit scope to this obligation which implies the parties must rely primarily on capacity building and consultation.

EC-SA TDCA: Article 45 Government procurement

1. The Parties agree to cooperate to ensure that access to the Parties' procurement contracts is governed by a system which is fair, equitable and transparent.
2. The Cooperation Council shall periodically review the progress made in this matter.

Table 1. Comparing Interim EPA Public Procurement Provisions and the EU-SA TDCA

Interim EPA	Public Procurement Exceptions	Public Procurement Provisions	Future negotiations
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Pacific	National Treatment –internal tax and regulation (Article 23.5)	None	No reference
EAC	Security Exception (Article 41)	None	Rendezvous Clause (Article 37)
SADC	National Treatment –internal tax and regulation (Article 18) Security Exception (Article 91)	None	No reference
ESA	National Treatment –internal tax and regulation (Article 18) Security Exception (Article 57)	None	Rendezvous Clause (Article 53)
CAR	National Treatment –internal tax and regulation (Article 23) Security Exception (Article 90)	Public Procurement Chapter	Establishing foundations for negotiation and implementation (Article 3(e))
<i>Mimeo:</i>			
EU-SA TDCA	No explicit reference	Cooperation and Review (Article 45)	n/a

In conclusion, then, the CARIFORUM EPA contains procurement provisions that are greater in scope and coverage than the interim EPAs and the EU-SA TDCA. This in an of itself is a remarkable situation given that, as demonstrated in earlier sub-sections, the CARIFORUM EPA's procurement provisions fall short of the procurement provisions contained in other FTAs that have both industrialised and developing countries as signatories.

2.3 Assessment of the CARIFORUM public procurement provisions

2.3.1 General Assessment

If the objective of CARIFORUM negotiators was to avoid using this EPA to structure a comprehensive reform of their national procurement systems then, arguably, they have succeeded. Stronger and more far-reaching provisions could have laid the groundwork for greater competition for state contracts, more variety and choice for state purchasers and better value for money. Softer public procurement provisions may harbour corrupt and clientelistic domestic procurement practices which are not in the interests of sustainable development or poverty alleviation. In short, the public procurement provisions of this EPA represent a missed opportunity.

As Cunningham (2008) indicates the EC and CARIFORUM negotiators have managed to conclude one of the few agreements on public procurement provisions that at present **excludes** market access commitments. The domestic "policy space" of the individual CARIFORUM members has been reserved with regard to public procurement--though to what constructive and legitimate end is not clear. Moreover, this EPA only rids national procurement systems of one type of discrimination - that relating to discrimination against the subsidiaries of foreign firms established in a party to the agreement. Overall, then, this EPA will do little to open public procurement to foreign firms, especially when compared to other RTAs signed by developing countries.

THE CARIFORUM STATES AND THE ECONOMIC PARTNERSHIP NEGOTIATIONS:

A glance at negotiating strategies and negotiating outcomes: Public Procurement

By Audel Cunningham, Legal Advisor CRNM

1. The Pre-EPA Government Procurement regime in CARIFORUM

Government procurement within the CARIFORUM states occurs on the basis of a basket of national laws and policies and in the absence of a central regional framework. With reference to the CARICOM States, the Revised Treaty of Chaguaramas provides for the negotiation of a protocol on government procurement as part of the regime of the Caribbean Single Market and Economy (CSME). The Caricom –Dominican Free Trade Agreement also has a built in agenda on government procurement, providing for the Parties thereto, to negotiate a Protocol on Government Procurement upon the full implementation / completion of the CSME regime.

2. Negotiating Challenges:

The major challenge in the negotiations arose from a combination of the negotiating configuration and the absence of any existing regional framework in that no commitments could be negotiated which could have the potential to pre-determine the content of the future regional regimes. At the same time, the recognition of these challenges served to give appropriate orientation to the requisite mandates, namely that the negotiations were to be confined to "Transparency in Government Procurement " only and that no market access commitments in favour of the EC were to be granted.

3. Negotiating Strategies:

The EC was the demander of government procurement rules for several reasons, namely:

- (i) The existence of EC offensive interests in securing access at some levels to CARIFORUM public procurement markets,

- (ii) EC insistence upon CARIFORUM's assumption of government procurement commitments extendable to each other as a means of further facilitating the creation of regional procurement markets (regional integration).

With the exception of development cooperation, CARIFORUM had no offensive interests in this area but rather had important defensive interests, namely to resist EC demands for market access so as to preserve existing policy space and not undermine or pre-determine the content of the regional frameworks to be established.

CARIFORUM's strategies in the government procurement negotiations were oriented by the mandate to limit the scope of the negotiations to transparency in government procurement only and not to offer market access to the EC. CARIFORUM's negotiation strategies also centered around the need to ensure that as far as possible, no commitments that would be applicable intra-CARIFORUM would be accepted, as this could have the potential to pre-determine the content of the regional regimes to be established in the future.

The deployment of this strategy involved a clear insistence on the use of best endeavour type language with reference to provisions that otherwise could have had the result of creating binding intra-CARIFORUM commitments. A clear example of this is seen in Article 167 (2) (a) creating a best endeavour obligation on the part of the CARIFORUM States to offer national treatment to each other's economic operators.

Negotiation strategies were further defined by the need to have a pro-development outcome and in this regard, negotiators exhibited a willingness to consider certain provisions provided they were tied to the provision of significant transition periods and the build up of CARIFORUM capacity. Article 180 (1) therefore allows the CARIFORUM States a period of two years within which to implement the obligations of the Chapter.

The CARIFORUM EPA does contain transparency-related obligations. Article 169 of the CARIFORUM EPA only obligates the parties to ensure that their laws and regulations relating to public procurement contracts are set out in a transparent manner 'without prejudice' to their chosen method of public procurement. Individual CARIFORUM parties may have highly selective eligibility criteria for government contracts bids - as long as these limited tendering procedures are made publicly known under the conditions set out in Article 171 of the EPA.

As regards positive commitments, Article 169 on Transparency should serve to improve national processes in terms of good governance, permitting a greater level of scrutiny and ultimately the establishment of value for money objectives. Article 182 of the CARIFORUM EPA on cooperation obligates the parties to cooperate in achieving the objectives of the provisions. The parties agree to exchange information on best regulatory practices and set up mechanisms to facilitate compliance with the obligations of this Chapter.

A development-related asymmetry has been built into the DSM, which provides some special and differential treatment for the CARIFORUM states. While Article 214 (3) obligates the EC to exercise 'due restraint' in seeking trade-related compensation from CARIFORUM States or in seeking to impose appropriate measures against a CARIFORUM state who has not complied with a determination of the Arbitration panel, there is no corresponding 'due restraint' obligation placed on the CARIFORUM States. Whether this is more of a political statement than legal provision is unclear.

The CARIFORUM EPA sets out the negotiated implementation period in Article 180. This normally gives CARIFORUM states two years from the agreement's ratification to bring their measures into conformity with any specific procedural obligations arising from the Chapter. An extension can be granted by the CARIFORUM-EC Trade and Development Committee, should the implementation period be insufficient. Certain CARIFORUM States are granted a five year implementation period, particularly with regard to publication and on-line information dissemination. The limited procurement provisions of this EPA, therefore, are not being immediately "foisted" on the CARIFORUM states. Correspondingly, the benefits of greater transparency will not be enjoyed immediately either.

2.3.2 Consideration of whether the EU CARIFORUM provisions are likely to foster or hamper regional integration among the non-EU partners to the Agreement

By pre-empting the possibility of different CARIFORUM member states concluding separate bilateral or sub-regional agreements with the EC, the CARIFORUM EPA preserves the option of developing region-wide responses to state purchasing matters in the Caribbean. Moreover, within the obligations of the EPA Article 4 on Regional Integration explicitly recognises the importance of regional integration as an integral element to their partnership and a powerful instrument to achieve the objectives of this Agreement. It goes on to acknowledge:

- the importance of regional integration among the CARIFORUM States as a mechanism for enabling these States to achieve greater economic opportunities, enhanced political stability and to foster their effective integration into the world economy.
- the efforts of the CARIFORUM States to foster regional and sub-regional integration amongst themselves through the existing regional treaties.¹⁰

While Article 4 also states that the pace and content of regional integration is a matter to be determined exclusively by the CARIFORUM States in the exercise of their sovereignty and given their current and future political ambitions, this does not compromise the commitments undertaken in the EPA. This cannot be considered to be a loophole because the rest of Article 4 states that the EPA:

'builds upon and aims at deepening regional integration and undertake to cooperate to further develop it, taking into account the Parties' levels of development, needs, geographical realities and sustainable development strategies, as well as the priorities that the CARIFORUM States have set for themselves and the obligations enshrined in the existing regional integration agreements'

The introduction of transparency obligations should remove unnecessary barriers to the procurement market without aiming to harmonise CARIFORUM Member's public procurement policies. At present, suppliers may decide to shop for CARIFORUM Member's with more open public procurement eligibility criteria in order to receive the most favourable treatment in bidding for state contracts.

The use of 'best endeavour' language with regard to non-discrimination in public procurement is as strong as the provisions concerning regional public procurement measures get in the CARIFORUM EPA. Again, this does not establish a regional public procurement regime beyond transparency requirements. However, to the extent that the CSME public procurement regime is in the process of being established, it will complement any regional trends in public procurement policy being encouraged by the CARIFORUM EPA.

Another key impact that the EPA commitments will have on the CSME regime is in the provision of cooperation and assistance to facilitate the development and implementation of the CSME regime and to improve national processes so that they comply with the CSME regime. The EPA transition periods of up to five years mean that the CSME regime should in principle have already been established within that timeframe.

The only regional mechanism established by the agreement is the creation of an on-line regional facility to disseminate tendering information and opportunities. It has been noted by the CRNM that these cooperation provisions in Article 182 (reproduced below) have already given rise to an approved document detailing the needs to be addressed in the CARIFORUM Member States at the regional, sub-regional, and national levels in order to comply with the

¹⁰ Article 4.3 references The Revised Treaty of Chaguaramas; the Treaty of Basseterre establishing the Organization of Eastern Caribbean States; and the Agreement establishing a Free Trade Area between the Caribbean Community and the Dominican Republic.

EPA commitments. Capacity building activities that have been identified at national and regional levels include a financing proposal for approximately US\$10M in support of undertaking the identified activities.

CARIFORUM EPA. Article 182 Cooperation

1. The Parties recognize the importance of cooperating in order to facilitate implementation of commitments and to achieve the objectives of this Chapter.
2. Subject to the provisions of Article 7, the Parties agree to cooperate, including by facilitating support and establishing appropriate contact points, in the following areas:
 - (a) Exchange of experience and information about best practices and regulatory frameworks;
 - (b) Establishment and maintenance of appropriate systems and mechanisms to facilitate compliance with the obligations of this Chapter; and
 - (c) Creation of an on-line facility at the regional level for the effective dissemination of information on tendering opportunities, so as to facilitate the awareness of all companies about procurement processes.

2.4 Policy options for government procurement provisions in the EPAs with the ACP countries that have yet to conclude the full set of negotiations

Given the adverse development-related consequences of poor public procurement regimes, the question facing policymakers is not whether there is a case for improving state purchasing practices but what initiatives are to be taken to do so and whether trade agreements can play a useful role in this regard. If a developing country already has a solid domestic programme to strengthen public procurement practices in place, which has demonstrated results and is very likely to continue to do so, then perhaps another initiative is not needed. The reality, however, is that most developing countries have not implemented reform programmes that have brought their public procurement procedures up to best practice and the option of taking advantage of the negotiation of an EPA to advance procurement reform should be given serious consideration. Policymakers in developing countries should focus on the development consequences of successful procurement reform and ignore the mercantilist instincts that plague the thinking of many trade negotiators and NGOs. This is one of those circumstances where trade agreements can be fruitfully used to improve national institutions, providing an impetus to do so that has often been lacking to date and, if done correctly, permanently increasing the cost of lobbying for favouritism and non-transparency. If the opportunity to improve public procurement practices through an EPA negotiation is missed, policymakers should ask how long their citizens will have to suffer before another promising opportunity for procurement reform materialises.

Policymakers in developing countries whose treasuries are strapped for cash should also recognise the benefits of getting better value for money out of tight procurement budgets. Research has demonstrated that increasing the number of bidders for government contracts (the nationality of which is unimportant) is what drives down average prices paid per unit. Moreover, measures to improve both transparency and access to national procurement markets will increase the number of bidders for state contracts. Domestic small and medium sized enterprises appear to be particularly responsive to improvements in the transparency of national procurement regimes. With these considerations in mind, policymakers in developing countries are recommended to adopt a full suite of transparency and non-discrimination provisions in future EPA negotiations. What this effectively means for the latter is going further than the public procurement provisions in the CARIFORUM EPA, certainly up to and beyond the procurement provisions contained in the other RTAs referred to in section 2.2.3. and in the other relevant examples given in the procurement section of Bourgeois, Dawar, and Evenett (2007). Unfortunately, the treatment of public procurement in the interim EPAs and in the EC-SA TDCA is so embryonic that incremental improvements over the provisions contained in this provision would not be appropriate. A serious attempt to promote and support public procurement reform through trade agreements requires a more

comprehensive approach, the principal elements of which are the reduction of favouritism (de jure and de facto preferences), improvements in the transparency of public procurement processes, and effective rights of redress for private sector participants and state parties. EPAs and RTAs in general are sufficiently flexible instruments of state-to-state cooperation that favouritism could be reduced and ultimately eliminated in stages over time. Should there be concerns about the capacity of local enterprises to withstand competition from European firms for state contracts, then future EPAs could in the first instance eliminate non-discrimination against the developing country signatories to an EPA. Complemented with measures to enhance notification of procurement contracts in the developing country signatories, this would facilitate the creation of a regional procurement market among the poorer EPA signatories. Measures to open up that market to European competition could then follow some years later. While this two-step process for enhancing the variety of suppliers available to procuring bodies in EPA nations would allow local firms time to improve their product offerings and productivity, it should be remembered that the savings enjoyed by state purchasers increase as the number of bidders rises--so the full benefits of procurement reform would only be felt after the second step was implemented. Cushioning local firms comes at a cost to state purchasers in developing countries and to the end users of public services, namely, citizens; this reality cannot be avoided.¹¹

Proper attention should be given to strengthening national capacities in state purchasing with a combination of technical assistance and implementation periods. Indeed, one option may be to complement the greater willingness by an EPA signatory to take on procurement-related obligations with more technical assistance from European nations. In this manner developing countries that take on more obligations would signal to development partners and the private sector the priority they attach to such reforms.

The use of review mechanisms in EPAs should be encouraged so as to increase the probability that procurement provisions are implemented properly and on time and, should the need arise, be progressively strengthened over time. Regional integration can be an ongoing process and the signing of an EPA need not represent the culmination of the signatories' efforts in these regards. Reviews should not be confined to compliance matters and to the collection of procurement-related statistics. The extent and usefulness of technical assistance and other measures to strengthen procurement-related capacities should be also evaluated. Moreover, evidence of any difficulties experienced in supplying EU state procurement markets by the firms from the developing country signatories to an EPA should be collected, the difficulties analysed, and if necessary, corrective measures proposed. The latter measures possibly include recommendations for reforms to procurement practices in Europe and aid for trade to the relevant exporters in developing countries.

¹¹ We are doubtful, therefore, of the merits of allowing countries to retain preferential procurement policies to the detriment of the other developing country members of the EPA. In a paper for an international organisation Woolcock (2008b), for example, calls for ACP states to be able to "retain preference schemes that serve clearly defined and objective development aims" (his italics, page 32). Notwithstanding the arguments made earlier about the lack of empirical evidence concerning the success of these schemes (at least in attaining the stated goals and not in enriching certain parties), if such an exemption were allowed it should only be invoked if the following four conditions were met: (i) that the preferential policy's effectiveness can and has been demonstrated in independent, objective research, (ii) that such research has shown that the preferential policy is indispensable (no other state or private sector measure can attain the same outcomes at lower cost) at the time of implementation and remains so throughout so long as the policy is in place, (iii) that the proposed preferential policy is no wider in scope than is absolutely necessary to attain the development goals, and (iv) that the proposed preferential policy is implemented no longer than is necessary to attain the development goals. Implementing such conditions would effectively require that any preferential policy be subject to frequent and independent review.

3 The provisions of the CARIFORUM EPA relating to competition law

Like its predecessor, the contents of this section proceeds from the general to the specific.

3.1 Development implications of competition law-related provisions in RTAs

In order to understand the potential contribution of this EPA's competition provisions it is important to set the discussion in its appropriate developmental context. Market forces--which can sometimes be distorted by anti-competitive practices of private and state firms--determine the prices at which goods are sold to customers and the quantity of goods available. Affordability and access of goods and services--some of which are essential items for the poor--are, therefore, directly affected by market forces and measures like competition law that seek to deter and punish anti-competitive acts.

Although many of the proponents of competition law stress its effects on economic efficiency, resource allocation, and sometimes productivity and economic growth¹², in fact competition law can have important distributive implications with direct consequences for the poor in developing countries. These are not just theoretical conjectures as the studies compiled and led by Stewart (2003) identified many anti-competitive practices that have harmed the populations and economies of the Caribbean region.

While it is important to recognise that the proper and effective application of competition law is not the only government measure that can promote inter-firm rivalry (trade reforms, foreign direct investment reform, price deregulation, and lowering the costs and time necessary to set up businesses are others), competition law is typically the only government measure that directly targets certain corporate practices which are thought to harm customers. Those practices include hard-core cartels (for which there are almost no legitimate defences for), restrictive agreements between manufacturers and distributors and between suppliers and manufacturers, mergers or acquisitions that unduly restrict competition, predatory pricing (that seeks to drive rival firms out of markets) and abuses of a dominant position by a firm or group of firms. In many jurisdictions, in particular in developing countries, without competition law these anti-competitive practices would go unchecked. Indeed, much of the impetus for enacting and strengthening competition laws in developing countries in the first place was to ensure that opening up to foreign competition, domestic deregulation, and privatisation of former state owned enterprises results in more inter-firm rivalry that benefits customers rather than less. Competition law, then, has been seen by many as a necessary accompaniment to other economic reform measures. That is, competition law is seen as a way of helping ensure that the benefits of economic reform are not entirely captured by small cliques of incumbent firms.

Of course, developing countries can enact and strengthen competition laws on their own, and some have. The question arises as to whether competition provisions in regional trade agreements, like the EPA between CARIFORUM and the EC, can contribute in this regard. To be frank, there is more evidence on the form of these competition provisions (and therefore on what they might achieve) than on what their actual impact has been (see Bourgeois, Dawar, and Evenett section 6). This is not surprising given that it is only in the past ten years that many RTAs began including provisions to promote competition, competition law enactment and enforcement, limit state subsidies which distort the competitive playing field, and international cooperation on competition law-related matters (such as enforcement cases, technical assistance, and sharing of best practices). Holmes, Müller, Papadopoulos, and Sydorak (2005), OECD (2006), Anderson and Evenett (2006), and very recently Teh (2008) describe, provide taxonomies of, and qualitatively

¹² Evenett (2005) identifies five ways in which the enforcement of competition law can improve the so-called supply side of developing economies. Each of these five means effectively influences the nature and form of private sector development in poorer countries, which for many is an important developmental goal in its own right.

assess the competition provisions of RTAs. In addition to careful overviews of the contents of competition chapters in RTAs, competition principles have also been entrenched in other chapters of RTAs, notably, those relating to government procurement, intellectual property rights, government monopolies and enterprises, and certain service sectors (typically where access to infrastructure is a critical bottleneck to competition, such as telecommunications). What is interesting about the latter provisions is that they demonstrate how competition principles and the goal of contestable markets can be seen to have priority over the mercantilist and market-opening objectives of RTAs (Anderson and Evenett 2006, Teh 2008). To those trade negotiators and policymakers aware of and open to these options, RTAs can be a useful vehicle to promote competition. Neither RTAs nor EPAs are inherently entirely mercantilist.

Anderson and Evenett (2006) also point out that the negotiation of a RTA can afford an opportunity for parties to strengthen their competition laws and their enforcement agencies, even though commitments to take these steps may not necessarily be written into the agreement. It is said that Costa Rica took tangible steps to strengthen its enforcement agency Comisión para Promover la Competencia (COPROCOM) after its RTA with Canada came into force. Policymakers in developing countries that seek to promote competition then might see the negotiation of an EPA as an opportunity to strengthen their national institutional capacity, whether through their own resources or with technical assistance. Turning to the quantifiable effects of competition provisions in RTAs, there is evidence that particular provisions influence the amount of foreign direct investment (FDI) entering a developing country. Although much discussion of foreign direct investment focuses on the setting up of new facilities (the so-called greenfield FDI), it should not be forgotten that much FDI is in fact in the form of cross-border mergers and acquisitions. The latter can play a useful role in developing and industrialised countries alike by keeping managers on their toes and helping finance the upgrading and expansion of firms.

Using a large sample of data (covering 116 countries over the years 1989-2004) Anderson and Evenett (2006) found that the total value of inward cross-border mergers and acquisitions was increased in countries that had signed on to transparency provisions in the competition chapters of RTAs. For a country with an existing merger review law, the most conservative estimate of the impact of signing a transparency provision was to raise the value of inward mergers and acquisitions by 43 percent. Moreover, a country with a merger review law in place that subsequently signed provisions on transparency, on measures against anti-competitive practices, on non-discrimination, and on due process was estimated to see an increase of inward mergers and acquisitions by 19 percent (again this is the most conservative estimate).

It is important to emphasise that the amount of evidence available to guide policymaking varies across the topics that are relevant here. The qualitative evidence that anti-competitive practices are not uncommon in developing countries--including in the Caribbean--is strong as is the evidence that stronger inter-firm rivalry depresses the prices customers pay (including the poor), induces productivity spurts and product and process innovations by firm. We also know more about the rich variety of competition-related provisions that can be implemented in RTAs. As to the effects of those provisions, we know less. However, what quantitative evidence is available suggests that packages of those provisions can foster the integration of developing countries into the world economy through the vehicle of corporate consolidation. Measures to enhance the transparency of competition law and enforcement regimes appear to bolster foreign direct investment of this sort the most.¹³

¹³ Some have argued, but not necessarily in the context of the EPA negotiations, that provisions on competition law and policy in trade agreements may restrict the "policy space" of developing country governments. Like the discussion on public procurement, this assertion is rarely backed up with evidence that the policy intervention in question is effective, indispensable, and has benefits that exceed the costs to society. (In the context of competition law most of the latter costs relate to the higher prices paid by customers, including the poor and governments, as governments try to form monopolies and other large firms.) Evenett (2007) contains an extensive analysis of the flawed arguments used by some to advance the proposition that governments should circumvent competition principles in the vain effort to promote development. It is unclear why the arguments and evidence referred to in Evenett (2007) do not apply with similar force in the ACP nations.

3.2 Legal Analysis of the CARIFORUM-EPA Provisions Relating to Competition Law

3.2.1 Introduction

This section analyses the structure and content of the legal provisions of the CARIFORUM EPA relating to competition policies. The section provides a textual analysis of the legal obligations regulating competition and where possible provides a comparative assessment of equivalent provisions within different regional trade agreements. Although competition was one of the WTO's Singapore Issues, as yet there is still no binding multilateral framework on competition law and policy.

The competition provisions of the CARIFORUM EPA fall under Chapter 1 of Title IV on Trade Related Issues. The competition chapter covers the following matters: Definitions (Article 125), Principles (Article 126), Implementation (Article 127), Exchange of information and enforcement cooperation (Article 128), Public enterprises and enterprises entrusted with special or exclusive rights including designated monopolies (Article 129), and Cooperation (Article 130).

Some RTAs do not contain any competition commitments at all¹⁴. This may be because one or more of the parties to the agreement do not have domestic competition rules in place and cooperation between competition agencies is therefore a moot point. Even though this is the case for some of the CARIFORUM Members, their EPA still contains competition provisions. To date, Jamaica, St. Vincent and the Grenadines, Barbados, Guyana and Trinidad and Tobago have passed legislation, while Suriname has completed its legislation and is in the process of enacting it. St. Vincent and the Grenadines, Guyana, and Trinidad and Tobago have yet to enact their legislation. Jamaica and Barbados are the only two States to have established Fair Trading Commissions. The countries of the Organisation of Eastern Caribbean States are still in the process of establishing a sub-regional competition authority that will enforce harmonised competition legislation. Belize is also receiving technical assistance to complete the drafting of its competition legislation.

EU bilateral agreements usually provide substantive commitments in the field of competition. For example, the agreements with Chile and Mexico include provisions that recognise the parties' respective competition authorities. Several of the Euro-Mediterranean Association Agreements include obligations to introduce competition legislation similar to that of the EU. While the EU-South Africa TCDA includes such substantive provisions defining anticompetitive practices, the treaty provisions, particularly those relating to implementation, information exchange and technical assistance, also reflect the development needs of South Africa and the possibility for anti-competitive practices to be allowed under certain conditions, most obviously relating to black empowerment programmes. Article 35 definition reads as follows:

- (a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition in the territory of the Community or of South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones;
- (b) abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof.

The implementation period of three years reflects the nascent stage of competition policy in South Africa at the time of the negotiations. Thus this obligation is supported by a provision obligating the EU to provide appropriate expertise to South Africa.

¹⁴ Examples of such RTAs include India-Singapore, US-Bahrain, Dominican Republic-Central American countries-US, US-Jordan, US-Morocco, and US-Oman.

EU-SA TDCA: Article 39 Technical assistance

The Community shall provide South Africa with technical assistance in the restructuring of its competition law and policy, which may include among others:

- (a) the exchange of experts;
- (b) organisation of seminars;
- (c) training activities.

These EU RTAs can be contrasted with those competition provisions negotiated by the US and Canada. These are limited to cooperation on competition matters without commitments to implement substantive competition rules.

The CARIFORUM EPA does not contain any substantive commitments. At the regional level, in 2001 the Caribbean Community (CARICOM) including the CARICOM Single Market and Economy (CSME) was established through the Revised Treaty of Chaguaramas.¹⁵

CARICOM's competition policy was developed with the aim of ensuring that the benefits expected from the CSME are not be frustrated by anti-competitive business conduct that could restrict or distort competition in the Member States and within the region. Given the existence of nascent or non-existent competition regimes, the commonality of the challenges faced is thought to reinforce the need for regional cooperation in respect of competition policy.

The following sections assess the competition provisions of the CARIFORUM EPA, using the same approach as the last section's legal analysis of this EPA's public procurement provisions. Where relevant, there is also an examination of the relevant provisions of the competition regime established by the Revised Treaty of Chaguaramas.

**THE CARIFORUM STATES AND THE ECONOMIC PARTNERSHIP NEGOTIATIONS:
A glance at negotiating strategies and negotiating outcomes: Competition Policy**

By Audel Cunningham, Legal Advisor CRNM

1. Pre-EPA structure of Competition Policy within the CARIFORUM States

There is a weak competition policy ethos within the CARIFORUM States. Anti-trust rules are classically seen as being unnecessary or unwelcome given the small size of CARIFORUM firms and CARIFORUM markets and the predominant ownership structure existing in many states, which sees the few dominant firms being controlled by leading families.

Only four CARIFORUM States currently have legislation implementing a competition policy regime (Jamaica, Barbados, Trinidad and Tobago and the Dominican Republic) but of this number, only two, Jamaica and Barbados, have established the necessary rule enforcement bodies specified in the legislations. Within the CARICOM arrangement, Chapter 8 of the Revised Treaty of Chaguaramas contains rules on competition policy and mandates the establishment of a Community Competition Commission to address cases of cross border anti-competitive conduct. This body was only recently commissioned into operation after the conclusion of the EPA negotiations. The Revised Treaty also mandates that CARICOM States must implement harmonized national competition policy legislation based upon the treaty provisions, so as to ensure the attainment of an effective competition policy regime in all the member states of the Community. Notwithstanding the existence of this obligation, as has been observed, there exists to this moment a failure or inability on the part of the majority of the CARICOM States to fulfill the stated obligation.

2 Negotiating Challenges

Given the existing obligation on CARICOM member states to enact competition policy legislation, as well as the fact that the Dominican Republic had embarked on the process of legislating competition policy rules, CARIFORUM's acceptance of substantive rules

¹⁵ CARICOM comprises fourteen Member States and five Associate States.

addressing competition policy were never in issue. In this regard, the CARIFORUM mandate on this subject prescribed an acceptance of the competition policy rules, provided that the EPA provisions did not surpass the content of the existing regional or national regimes. Negotiating challenges however arose principally from the negotiating configuration coupled with the varying layers of integration within CARIFORUM. The Dominican Republic is not a part of the CARICOM arrangement and is therefore not a party to the obligation to enact harmonized competition policy legislation nor is it subject to the jurisdiction of the CARICOM Competition Commission. At the time of the negotiations, the Bahamas and Haiti though members of CARICOM, were not parties to the trade regime establishing the Caribbean Single Market and Economy (CSME) and like the Dominican Republic were also not participants in the CARICOM competition policy regime.

The challenges posed by the different layers of integration became manifest in the negotiations on the enforcement cooperation provisions (Article 128) when CARIFORUM became faced with EC reluctance to cooperate with all the various existing or contemplated competition enforcement agencies of the CARIFORUM States. CARIFORUM considered it essential to have strong provisions obliging the EC to cooperate in competition policy enforcement with the CARIFORUM Competition agencies so to ensure effective rule enforcement and faced with the EC reluctance to cooperate with more than a limited number of agencies, had to accept agreement for cooperation with only the CARICOM Competition Commission and the Competition Authority of the Dominican Republic. This means that until the Bahamas accedes to CARICOM's CSME regime, proper administrative arrangements will have to be put in place to ensure coordination in competition policy enforcement between the Competition Authority of the Bahamas when established, and the CARICOM Competition Commission.

3 Negotiating Strategies:

CARIFORUM was able to successfully negotiate a pro-development Competition Policy Chapter in the EPA, primarily as a result of the utilization of clearly defined strategies. Chief among such strategies was a clear identification of defensive or offensive interests.

Given the pre-EPA movement towards developing competition policy regimes in the region, CARIFORUM had no offensive interests in this area save and except in the area of development support and enforcement cooperation. Development support under this Chapter of the EPA was seen as not just necessary to enable the CARIFORUM states to assume (for many States) novel obligations, but as being supportive of the attempts by CARIFORUM states to fulfill their obligations under pre-existing treaty arrangements. This aspect of development support was therefore seen as being critical to the fostering of regional integration and the establishment of a strong regional regulatory regime and was enabled by the stated objective of the EPA to foster regional integration.

The CARIFORUM wish list consisted primarily of the provision of development financial and other development support for:

- (i) the design and drafting of appropriate competition policy legislation
- (ii) the training of CARIFORUM officials involved in the enforcement of competition policy at all levels
- (iii) making operational, the administrative bodies required to oversee competition policy legislation.

A second employed strategy justifiable under the rubric of a "pro-development EPA", was CARIFORUM's insistence upon tying the assumption of the proposed obligations to suitably long transition periods. To a great extent, this demand was necessitated not just by the exiting realities of the capacity constraints of the CARIFORUM States, but also by the orientation of the agreement as a region to region one, with the consequence that all states were expected to act in tandem in the fulfilment of the prescribed obligations.

Finally, although not having been a demander of Competition Policy, CARIFORUM's negotiating strategy involved it being the first side to table draft text in this area so as to exercise some measure of control over the manner in which EC counter proposals evolved.

3.2.2 Comparative Textual Analysis of Competition Provisions

3.2.2.1 The Preamble Statements and General Objectives

The CARIFORUM EPA preamble does not contain any direct statements regarding the promotion of competition, nor do many other RTAs¹⁶. Of those RTAs that do, some refer to competition policy in one statement together with other issues¹⁷. However, within the competition chapter itself, Article 126 of the CARIFORUM EPA sets out the principles of the chapter and explicitly acknowledges the need to tackle anti-competitive behaviour conducted by firms:

The CARIFORUM EPA. Article 126 Principles

The Parties recognise the importance of free and undistorted competition in their trade relations. The Parties acknowledge that anti-competitive business practices have the potential to distort the proper functioning of markets and generally undermine the benefits of trade liberalization. They therefore agree that the following practices restricting competition are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Parties:

- (a) agreements and concerted practices between undertakings, which have the object or effect of preventing or substantially lessening competition in the territory of the EC Party or of the CARIFORUM States as a whole or in a substantial part thereof;
- (b) abuse by one or more undertakings of market power in the territory of the EC Party or of the CARIFORUM States as a whole or in a substantial part thereof.

Other RTAs¹⁸ also include separate statements concerning competition policy that may in certain cases appear in the operative part of the agreement, as the following example attests:

US-Singapore FTA. Article 12.1

Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe prosecuting such conduct, implementing economically sound competition policies, and engaging in cooperation will help secure the benefits of this Agreement.

It is noteworthy that Article 126 of the CARIFORUM EPA refers to the potential for anti-competitive practices to undermine the trade enhancing objectives of the RTAs, rather than anti-competitive practices per se. This suggests that an anti-competitive practice that in no way affects international commerce between the signatories would fall outside any of the competition-related obligations of this EPA. However, it is difficult to discern just how limiting the requirement of a trade-related effect is, especially when it is recalled that anti-competitive practices affecting the supply of inputs (not just parts, components, and energy but also transportation and distribution services) can indirectly affect trade and investment flows between signatories. Still, the requirement of trade-related impact is there and can be found in many other RTAs too (Bourgeois, Dawar, and Evenett, 2007).

¹⁶ These RTAs without competition statements in the preamble include: EU-Chile, Singapore-Australia, Canada-Chile, Japan-Malaysia, Japan-Mexico, Korea-Singapore, New Zealand-Singapore, US-Australia, US-Chile, and US-Peru RTAs.

¹⁷ The Japan-Philippines and Japan-Singapore RTAs. The former, for example contains a preamble statement: "Acknowledging that encouraging innovation and competition and improving their attractiveness to capital and human resources can enhance their ability to respond to [such] new challenges and opportunities."

¹⁸ Canada-Costa Rica, EFTA States-Chile, EFTA States-Mexico, EFTA States-Singapore, and US-Singapore RTAs.

3.2.2.2 The Scope of Obligations

The CARIFORUM EPA contains competition-related commitments in two main areas: a) in the enactment and enforcement of competition law and b) in enhancing cooperation between the agencies responsible for the enforcement of competition laws (so-called competition agencies). The competition chapter of this EPA incorporates by reference for the EC Party, Articles 81, 82 and 86 of the Treaty establishing the European Community, and their implementing regulations or amendments and for the CARIFORUM States, Chapter 8 of the Revised Treaty of Chaguaramas of 5 July 2001, national competition legislation complying with the Revised Treaty of Chaguaramas and the national competition legislation of The Bahamas and the Dominican Republic. The provisions for Chapter 8 are examined in section 3.3.3. below.

Article 127 of the CARIFORUM EPA effectively obligates the CARIFORUM states to enact and implement competition legislation within five years of the entry into force of the EPA. Steps to promote cooperation between national competition agencies are encouraged under Article 128 and would be reviewed subsequently.

CARIFORUM EPA. Article 127 Implementation

1. The Parties and the Signatory CARIFORUM States shall ensure that within five years of the entry into force of this Agreement they have laws in force addressing restrictions on competition within their jurisdiction, and have established the bodies referred to in Article 125 (1).
2. Upon entry into force of the laws and the establishment of the bodies referred to in paragraph 1, the Parties shall give effect to the provisions of Article 128. The Parties also agree to review the operation of this Chapter after a confidence-building period between their Competition Authorities of six years following the coming into operation of Article 128.

Another scope-related consideration relates to public enterprises and those enterprises given specific responsibilities by government. The disciplines of the competition chapter relate to public sector firms unless excluded under Article 129. Article 129.2 provides for specific circumstances under which the disciplines of the competition chapter are not binding on a CARIFORUM EPA signatory. This particular article implies that enterprises pursuing a social mandate, for example, would not necessarily be subject to the principles of the competition chapter. Article 129.4 recognises that some state monopolies may effectively discriminate against EC firms and that such discrimination is to be phased out within five years of this EPA agreement coming into force.

CARIFORUM EPA. Article 129 Public enterprises and enterprises entrusted with special or exclusive rights including designated monopolies

1. Nothing in this Agreement prevents a Party or a Signatory CARIFORUM State from designating or maintaining public or private monopolies according to their respective laws.
2. With regard to public enterprises and enterprises to which special or exclusive rights have been granted, the Parties and the Signatory CARIFORUM States shall ensure that, following the date of the entry into force of this Agreement, there is neither enacted nor maintained any measure distorting trade in goods or services between the Parties to an extent contrary to the Parties interest, and that such enterprises shall be subject to the rules of competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.
3. By derogation from paragraph 2, the Parties agree that where public enterprises in the Signatory CARIFORUM States are subject to specific sectoral rules as mandated by their respective regulatory frameworks, such public enterprises shall not be bound or governed by the provisions of this Article.
4. The Parties and the Signatory CARIFORUM States shall progressively adjust, without prejudice to their obligations under the WTO Agreement, any State monopolies of a commercial nature or character, so as to ensure that, by the end of the fifth year following the

entry into force of this Agreement, no discrimination regarding the conditions under which goods and services are sold or purchased exists between goods and services originating in the EC Party and those originating in the CARIFORUM States or between nationals of the Member States of the European Union and those of the CARIFORUM States, unless such discrimination is inherent in the existence of the monopoly in question.

5. The CARIFORUM-EC Trade and Development Committee shall be informed about the enactment of sectoral rules provided for in paragraph 3 and the measures adopted to implement paragraph 4.

3.2.2.2.1. Comparing the CARIFORUM EPA scope to other recently-signed RTAs

In a recent comparative study of the competition provisions of 27 recent RTAs, there were practically no commitments on substantive rules on competition law (Bourgeois, Dawar, and Evenett 2007). In some the parties simply agree that there should be no competitive advantages to state-owned businesses¹⁹. Notably, there were no provisions setting out competition rules that must apply to anti-competitive conduct that affects trade between the parties. Nor were there provisions obligating one party to introduce in its domestic system a competition regime similar to that of the other party, unlike a number of EC RTAs. This has been attributed to the priority of ensuring that laws and their enforcement are non-discriminatory, rather than promoting the convergence of the substantive provisions of competition laws.²⁰

3.2.2.3 Procedural Provisions

Once the CARIFORUM parties have implemented their domestic competition regimes, the CARIFORUM EPA 'enables' Members' Competition Authorities to inform each other of their willingness to co-operate with respect to enforcement activity and 'may' exchange information. The exchange of information is commonly a sensitive area because one party wants to be able to request information from the other party and there is the possibility that non-public information may be used in criminal investigations.

CARIFORUM EPA. Article 128 Exchange of information and enforcement cooperation

1. Each Competition Authority may inform the other Competition Authorities of its willingness to co-operate with respect to enforcement activity. This cooperation shall not prevent the Parties or the Signatory CARIFORUM States from taking autonomous decisions.

2. With a view to facilitating the effective application of their respective competition laws, the Competition Authorities may exchange non-confidential information. All exchange of information shall be subject to the standards of confidentiality applicable in each Party and the Signatory CARIFORUM States.

3. Any Competition Authority may inform the other Competition Authorities of any information it possesses which indicates that anticompetitive business practices falling within the scope of this Chapter are taking place in the other Party's territory. The Competition Authority of each Party shall decide upon the form of the exchange of information in accordance with its best practices. Each Competition Authority may also inform the other Competition Authorities of any enforcement proceeding being carried out by it in the following instances:

- (i) The activity being investigated takes place wholly or substantially within the jurisdiction of any of the other Competition Authorities;
- (ii) The remedy likely to be imposed would require the prohibition of conduct in the territory of the other Party or Signatory CARIFORUM States;
- (iii) The activity being investigated involves conduct believed to have been required, encouraged or approved by the other Party or Signatory CARIFORUM States.

¹⁹ See for example, the Singapore-Australia, Japan-Thailand and Korea-Singapore RTAs.

²⁰ Jenny (2004) pp. 22.

The CARIFORUM EPA provisions are both narrower in scope and less far-reaching than the EC-Chile RTA, for example, which includes provisions on exchanging information, improving transparency and information exchange subject to standards of confidentiality.

EC-Chile RTA. Article 177

1. With a view to facilitating the effective application of their respective competition laws, the competition authorities may exchange non-confidential information.
2. For the purposes of improving transparency, and without prejudice to the rules and standards of confidentiality applicable in each Party, the Parties hereby undertake to exchange information on regulatory sanctions and remedies applied in the cases that, according to the competition authority concerned, are significantly affecting important interests of the other Party and to provide the grounds on which those actions were taken, when requested by the competition authority of the other Party.
3. [relating to state aid].
4. All exchanges of information shall be subject to the standards of confidentiality applicable in each Party. Confidential information whose dissemination is expressly prohibited or which, if disseminated, could adversely affect the interest of the Parties, shall not be provided without express consent of the source of information.
5. Each competition authority shall maintain the confidentiality of any information provided to it in confidence by the other competition authority, and oppose any application for disclosure of such information by a third Party that is not authorized by the competition authority that supplied the information.
6. In particular, where the laws of a Party so provide, confidential information may be provided to their respective courts of justice, subject to maintaining its confidentiality to the respective courts.

Article 128.3.(i)-(iii) on notification is also a comparatively 'soft' cooperation provision because there is no compulsion for the parties to implement these measures, particularly when compared to the Canada-Costa Rica RTA provisions on notification. Here a non-exhaustive list sets out enforcement actions that will normally require notification, such as those involving anti-competitive activities carried out in whole or in part in the territory of the other party and may be significant for that party.

Canada-Costa-Rica RTA. Article XI.3

3. For the purpose of this Chapter, enforcement actions that may affect important interests of the other Party and therefore will ordinarily require notification include those that:
 - a) are relevant to enforcement actions of the other Party;
 - b) involve anti-competitive activities, other than mergers and acquisitions, carried out in the whole or in part in the territory of the other Party and that may be significant for that other Party;
 - c) involve mergers and acquisitions in which one or more of the enterprises involved in the transaction, or an enterprise controlling one or more of the enterprises to the transaction, is incorporated or organized under the laws of the other Party [...];
 - d) involved remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in that territory; or
 - e) involve the seeking of information located in the territory of the other Party, whether by personal visit by officials of a Party or otherwise, except with respect to telephone contacts with a person in the territory of the other Party where that person is not subject to enforcement action and the contact seeking only a response on a voluntary basis.
 - f) Notifications will ordinarily be given as soon as the competition authority of the Party becomes aware that the notifiable circumstances pursuant to paragraphs 2 and 3 are present.

Cooperation through technical assistance is covered in Article 130 of the CARIFORUM EPA. Here the Parties agree to cooperate in the efficient functioning of the CARIFORUM Competition Authorities:

CARIFORUM EPA. Article 130 Cooperation

1. The Parties agree on the importance of technical assistance and capacity-building to facilitate the implementation of the commitments and achieve the objectives of this Chapter and in particular to ensure effective and sound competition policies and rule enforcement, especially during the confidence-building period referred to in Article 3.

2. Subject to the provisions of Article 7 the Parties agree to cooperate, including by facilitating support, in the following areas:

- (a) the efficient functioning of the CARIFORUM Competition Authorities;
- (b) assistance in drafting guidelines, manuals and, where necessary, legislation;
- (c) the provision of independent experts; and
- (d) the provision of training for key personnel involved in the implementation of and enforcement of competition policy.

These commitments are not unusual features of RTAs. Some also contain commitments relating to two or more procedural rules, such as notification, consultation, exchange of information, and even coordination of enforcement. However, the strength varies from the softer 'may' to the stronger and binding language negotiated in the EU Chile agreement, for example:

EU-Chile FTA. Article 172(3)

The Parties agree to cooperate and coordinate among themselves for the implementation of competition laws. The cooperation includes notification, consultation, exchange of non-confidential information and technical assistance.

Like most other RTAs, the CARIFORUM-EC EPA exempts the provisions in the competition chapter of the agreement from the dispute settlement procedures created by that agreement.

3.2.3 The 2001 Revised Treaty of Chaguaramas and its relationship to the CARIFORUM EPA

As noted above, the Caribbean Community (CARICOM) including the CARICOM Single Market and Economy (CSME) was established in 2001 by the Revised Treaty of Chaguaramas (RTC). The latter includes provisions on regulating competition within CARICOM.

3.2.3.1 Competition Policy

The rules governing competition policy within CARICOM are provided for in Chapter 8 of the Revised Treaty of Chaguaramas. Member States the Caribbean Single Market and Economy (CSME) are obliged to implement the provisions of Chapter 8 which establishes a Community Competition Commission (CCC) with jurisdiction over all cases of cross border anti-competitive conduct.

The CCC was recently established in Suriname in January 2008 and its main responsibilities within the CARICOM Single Market and Economy (CSME) include:

- To apply the rules of competition
- To promote and protect competition
- To co-ordinate the implementation of Competition Policy,
- To monitor anti-competitive business conduct
- To promote the establishment of national Competition Institutions and harmonisation of Competition Law

- To advise the Council for Trade and Economic Development on Competition and Consumer Protection policies

Article 30(b) places obligations on all CSME member states to enact competition policy legislation and establish competition enforcement bodies. At the time of writing, the majority of the CSME States have still not enacted the necessary national legislative frameworks. Haiti for example has not yet embarked on establishing competition policy. Jamaica and Barbados, on the other hand, have enacted competition policy legislation and have established enforcement bodies, St. Vincent and the Grenadines never promulgated their competition law, while Trinidad and Tobago enacted competition policy legislation but are still in the process of establishing. The Commonwealth of the Bahamas and the Dominican Republic, who are signatories of the CARIFORUM EPA but not the CSME, are currently in the process of enacting competition policy legislation. Nevertheless, once the Organisation of Eastern Caribbean States Sub-regional Competition Authority is established, Antigua and Barbuda, St. Kitts and Nevis, Dominica, St. Lucia, St. Vincent and the Grenadines, Monserrat and Grenada will automatically be in compliance with Article 30(b).

Revised Treaty Of Chaguaramas

Article 30(b) Implementation of Community Competition Policy

1. In order to achieve the objectives of the Community Competition Policy,
 - (a) the Community shall:
 - (i) subject to the Treaty, establish appropriate norms and institutional arrangements to prohibit and penalise anti-competitive business conduct;
 - (ii) establish and maintain information systems to enable enterprises and consumers to be kept informed about the operation of markets within the CSME;
 - (b) Member States shall:
 - (i) take the necessary legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct;
 - (ii) provide for the dissemination of relevant information to facilitate consumer choice;
 - (iii) establish and maintain institutional arrangements and administrative procedures to enforce competition laws;
 - (iv) take effective measures to ensure access by nationals of other Member States to competent enforcement authorities including the courts on an equitable, transparent and non-discriminatory basis.
2. A Member State shall establish and maintain a national competition authority for the purpose of facilitating the implementation of the rules of competition.
3. A Member State shall require its national competition authority to:
 - (a) co-operate with the Commission in achieving compliance with the rules of competition;
 - (b) investigate any allegations of anti-competitive business conduct being allegations referred to the authority by the Commission or another Member State.
 - (c) cooperate with other national competition authorities in the detection and prevention of anti-competitive business conduct, and the exchange of information relating to such conduct.
4. Nothing in this Article shall be construed as requiring a Member State to disclose confidential information, the disclosure of which would be prejudicial to the public interest or to the legitimate commercial interests of enterprises, public or private. Confidential or proprietary information disclosed in the course of an investigation shall be treated on the same basis as that on which it was provided.
5. Within 24 months of the entry into force of this Protocol, Member States shall notify the COTED [Council for Trade and Economic Development] of existing legislation, agreements and administrative practices inconsistent with the provisions of this Protocol. Within 36 months of entry into force of this Protocol, the COTED shall establish a programme providing for the termination of such legislation, agreements and administrative practices.

To summarise, Chapter 8 provisions requires Member States to cooperate in the determination of competition legislation and to 'take the necessary legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for

anti-competitive business conduct.²¹ They also provide for cooperation between national authorities in Member States and the Community Competition Commission (CCC), in achieving compliance with the rules of competition. However, it is the responsibility of the CCC to cooperate with the national authorities, provide support and facilitate information exchange and expertise.²²

Co-operation between the national competition authorities in the different Member States is binding to the extent that every Member State 'shall require' its national competition authority to co-operate with other national competition authorities in the detection and prevention of anti-competitive business conduct, and the exchange of information relating to such conduct.²³ However, once more it must be remembered that within CARIFORUM countries, several competition regimes are still either nascent or non-existent.

3.2.3.2 The Scope of the Treaty

The substantive obligations of the competition provisions are provided for in Part III: Rules of Competition and include:

- Article 30(i) Prohibition of Anti-Competitive Business Conduct
- Article 30(j) Determination of Dominant Position
- Article 30(k) Abuse of a Dominant Position
- Article 30(l) Negative Clearance Rulings
- Article 30(m) De Minimis Rule
- Article 30(n) Powers of COTED Respecting Community Competition Policy Rules
- Article 30(o) Exemptions

3.2.3.3 Dispute settlement mechanism in respect of competition policy

In addition to monitoring and investigating the anticompetitive practices of enterprises operating in the CSME, the CCC settles disputes related to competition policy and parties are obligated to comply promptly with the judgement of the CCC. Each party is responsible for the fees and expenses of conciliation and arbitration. Individuals and firms are permitted to have cross-border competition disputes addressed by the Regional Competition Agency, appeals to the Court against any decision of the Regional Commission will have to be taken by a member-state.

The parties also have recourse to the dispute settlement mechanisms set out in Chapter 9 of the Treaty, but only if the dispute concerns the interpretation and application of the Treaty. The dispute settlement mechanism under Chapter 9 of the Treaty only permits States to be parties to the disputes; businesses and consumers do not have standing unless an individual or company has standing to appear, with leave of the Caribbean Court of Justice (CCJ), as parties in proceedings in certain set circumstances:

- when the CCJ has decided that a benefit or right conferred by the revised Treaty on a Member State is designed to directly benefit these persons
- where these persons have established that they have been prejudiced in the enjoyment of this right or benefit
- where the Member State which should have brought a claim on behalf of a person or company has declined or omitted to do so, or has expressly consented to allow the persons concerned to bring the claims instead of the Member State entitled to do so;
- where the CCJ has decided to allow the person to pursue the claim in the interest of justice.

Since its establishment the CCJ has not made any decisions involving disputes between two Member States.

²¹ Article 170 1(b)(i).

²² Article 173 Subsections (e) – (h).

²³ Article 170 (3)(a – c).

The CCC acts as a regional Commission to deal with cross-border matters. However, given that the bulk of member-states might be unable to set up competition authorities, the CCC is also expected to operate as a domestic Commission for such states as are unable to establish domestic agencies. The CARICOM competition legislation therefore has dual application: to take the necessary legislative measures to ensure consistency and compliance with the rules of competition and to provide penalties for anti-competitive business conduct, while taking effective measures to ensure access by nationals of other member states to competent enforcement authorities, including the courts, on an equitable, transparent and non-discriminatory basis.

3.2.4 Assessment of the Interim EPA Competition Provisions

Table 2 summarises the competition law and policy-related provisions of the Interim EPAs. As this Table makes clear, the CAR Interim Agreement contains the most extensive such provisions. In what follows those provisions are compared with those contained in the EU-SADC TADC.

Table 2: Comparing Interim EPA Competition Provisions and the EU-SA TDCA

Interim EPA	Competition objectives	Competition provisions	Future negotiations
Pacific	No reference	None	No reference
EAC	No reference	None	Rendezvous Clause (Article 37)
SADC	Supporting conditions for competitiveness (Article 1(e))	None	No reference
ESA	No reference	None	Rendezvous Clause (Article 53)
CAR	Establishing foundations for negotiation and implementation (Article 3(e))	Chapter	Conclude negotiations: 1/1/2009
<i>Mimeo:</i>			
EU-SA TDCA	n/a	Substantive provisions; Special and Differential Treatment (Article 35-40)	n/a

The CAR Interim Agreement contains competition provisions setting out the need to negotiate competition policy within the EPA, including rules to prohibit anticompetitive practices which significantly affect trade. As with the CAR public procurement provisions, two stages are envisaged for the negotiations, firstly the application of rules in the context of Central African regional integration; only then can the negotiation of the application of rules at the bilateral level begin. This clearly preserves policy space at the national level, while the regional expertise is being built. The date agreed to for concluding the negotiations is the same as for the public procurement negotiations – 1/1/2009. The ESA and EAC Interim agreement sets out the same rendezvous clause for competition negotiations as for public procurement, without a date for concluding negotiations. SADC and the Pacific do not made any reference to negotiating competition within a future EPA.

CAR Interim EPA Chapitre 2 Concurrence

Article 57 Poursuite des négociations dans le domaine de la concurrence

1. Les parties reconnaissent l'importance de la concurrence libre et sans distorsion dans leurs relations commerciales, et le fait que certaines pratiques anticoncurrentielles peuvent restreindre le commerce entre les parties et ainsi gêner l'accomplissement des objectifs de cet accord.

2. Les parties acceptent donc de s'engager dans les négociations d'un chapitre dans le domaine de la concurrence dans l'APE, qui comprendra notamment les éléments suivants:
 - (a) pratiques anticoncurrentielles qui sont considérées incompatibles avec le fonctionnement approprié de cet accord, dans la mesure où elles peuvent toucher le commerce entre les parties;
 - (b) dispositions sur la mise en oeuvre efficace des politiques et règles de concurrence et des politiques au niveau régional en Afrique centrale qui encadrent les pratiques anticoncurrentielles identifiées conformément au paragraphe 2 (a);
 - (c) dispositions sur l'assistance technique par les experts indépendants pour assurer la réalisation des objectifs du chapitre et de l'application efficace des politiques de concurrence au niveau régional en Afrique centrale.
3. Les négociations seront basées sur une approche en deux étapes, visant d'abord à appliquer les règles dans le contexte de l'intégration régionale en Afrique centrale et, après une période de transition déterminée conjointement, appliquer les règles au niveau bilatéral.
4. Les négociations sur le chapitre de concurrence seront conclues avant le 01/01/2009.

The provisions regulating competition in the EC-SA TDCA are very strong compared to the Interim EPAs. There is, however, an implementation period of three years for the parties to implement appropriate competition laws to address anticompetitive practices that substantially lessen competition unless there is a stronger pro-competitive rationale for these practices. In addition in the TDCA, there are provisions covering comity, information exchange and detailed obligations for the EC to provide technical assistance to South Africa.

EC-SA TDCA Competition Policy

Article 35 Definition

The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and South Africa:

- (a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition in the territory of the Community or of South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones;
- (b) abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof.

Article 36 Implementation

If, at the entry into force of this Agreement, either Party has not yet adopted the necessary laws and regulations for the implementation of Article 35, in their jurisdictions it shall do so within a period of three years.

Article 37 Appropriate measures

If the Community or South Africa considers that a particular practice in its domestic market is incompatible with the terms of Article 35, and:

- (a) is not adequately dealt with under the implementing rules referred to in Article 36, or
- (b) in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interests of the other Party or material injury to its domestic industry, including its services industry, the Party concerned may take appropriate measures consistent with its own laws, after consultation within the Cooperation Council, or after 30 working days following referral for such consultation. The appropriate measures to be taken shall respect the powers of the Competition Authority concerned.

Article 38 Comity

1. The Parties agree that, whenever the Commission or the South African Competition Authority has reason to believe that anti-competitive practices, defined under Article 35, are

taking place within the territory of the other authority and are substantially affecting important interests of the Parties, it may request the other Party's competition authority to take appropriate remedial action in terms of that authority's rules governing competition.

2. Such a request shall not prejudice any action under the requesting authority's competition laws that may be deemed necessary and shall not in any way encumber the addressed authority's decision-making powers or its independence.

3. Without prejudice to its respective functions, rights, obligations or independence, the competition authority so addressed shall consider and give careful attention to the views expressed and documentation provided by the requesting authority and, in particular, pay heed to the nature of the anti-competitive activities in question, the firm or firms involved, and the alleged harmful effect on the important interests of the aggrieved Party.

4. When the Commission or the Competition Authority of South Africa decides to conduct an investigation or intends to take any action that may have important implications for the interests of the other Party, the Parties must consult, at the request of either Party and both shall endeavour to find a mutually acceptable solution in the light of their respective important interests, giving due regard to each other's laws, sovereignty, the independence of the respective competition authorities and to considerations of comity.

Article 39 Technical assistance

The Community shall provide South Africa with technical assistance in the restructuring of its competition law and policy, which may include among others:

- (a) the exchange of experts;
- (b) organisation of seminars;
- (c) training activities.

Article 40 Information

1. The Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

2. The Parties agree that it is in their interests to ensure that public aid is granted in a fair, equitable and transparent manner.

In sum, then, the CARIFORUM EPA contains many of the same types of competition law-related provision as the EC-SA TADC. Arguably, the formers' scope are wider as they include provisions on public enterprises and monopolies. Moreover, developments over time in the Caribbean region may provide the basis upon which cooperation with European partners may develop further--but it should be recalled that those developments may well occur without independently of the CARIFORUM EPA.

3.3 Assessment of the CARIFORUM competition provisions

3.3.1 General Assessment

By stipulating the enactment and enforcement of competition laws in the Caribbean region, this EPA reinforces an important element of the appropriate regulation of firms in developing countries. Moreover, these provisions are not too prescriptive in specifying which agency will implement competition law, allowing for regional and sub-regional enforcement agencies to be developed where appropriate and where limited resources dictate. The provisions of the CARIFORUM EPA are no more onerous for the CARIFORUM Members than the obligations set out in the Revised Treaty of Charaguamas and taken on by Caribbean countries before this EPA negotiation was initialled.

While affirmation of the importance of competition law and its enforcement is valuable, no one should be in any doubt that it is the sustained commitment of national governments to fund and to support their competition agencies that leads to the effective deterrence and punishment of anti-competitive practices, both national and international. The CARIFORUM

EPA provides signatory governments with an opportunity to demonstrate or renew their commitment to promoting rivalry between firms so as to lower prices, increase choice, and stimulate productivity growth and innovation.

Under this EPA the implementation period for enacting competition legislation is five years. Following this, the parties should implement the cooperation provisions. While cooperation agreements as the exchange of information and consultations may be viewed by some as a burden on limited resources, the language negotiated in the EPA provisions are limited to 'may' rather than 'shall'. This indicates a non-binding obligation and shows some appreciation of the circumstances of the poorer signatories. Even so, it should be remembered that the benefits of agency-to-agency cooperation require financial and political commitment from government to enable their competition agencies to build the trust of other agencies and to participate effectively in international fora.

There are no specific development provisions set out in the Competition Chapter, although Article 130 on Cooperation agrees on the importance of technical assistance and capacity building in promoting competitive markets.

3.3.2 Consideration of whether the EU CARIFORUM provisions are likely to foster or hamper regional integration among the non-EU partners to the Agreement

As noted in the analysis on public procurement, the CARIFORUM EPA is a regional agreement which explicitly recognises in Article 4 the importance of regional integration as an integral element in enhancing the economic development of the CARIFORUM states. The EPA requirements also incorporate by reference (in Article 125.3(a)) the competition chapter of the Revised Treaty of Charaguaramas, which additionally aims to foster regional integration. This is because at the regional level there are ongoing CARIFORUM initiatives aimed at ensuring that all CSME states comply with their competition law-related treaty obligations. These initiatives include the CARICOM Competition Policy Task Force entrusted with the responsibility of facilitating the establishment of the Community Competition Authority and a CARICOM Legislative Drafting Facility charged with preparing draft competition policy legislation for member state adoption. It would seem, then, that the CARIFORUM EPA is compatible with current measures to promote regional and sub-regional approaches to the enforcement of competition law in the Caribbean region. However, to the extent that the Bahamas and the Dominican Republic are not parties to the CSME arrangement, these Members are not brought under the same provisions of the Revised Treaty of Charaguaramas. Furthermore, given the slow to non-existent progress some CARIFORUM members are making in implementing their national competition regimes, there is little coherence between the competition policies of these states. This necessarily limits the effectiveness of the regional initiatives such as the Competition Policy Task Force.

3.4 Policy options for competition law provisions in the EPAs with the ACP countries that have yet to conclude the full set of negotiations

Before discussing policy options in detail, it is worth recalling that existing research has shown that the ACP countries too are affected by anti-competitive practices, which are private and public, domestic and international.²⁴ If anything, some research has shown that international cartels target jurisdictions with weak enforcement regimes. In which case, countries need to develop--individually or in cooperation with others--enforcement regimes for competition law that effectively deter or punish anti-competitive practices. Trade agreements, including EPAs, can play a useful contribution in this regard by entrenching a

²⁴ In the case of the Sub-Saharan African countries, Evenett, Jenny, and Meier (2006) have constructed a database of allegations reported by African sources in Sub-Saharan Africa. Summary statistics on these allegations of anti-competitive practices, broken down by country affected and by anti-competitive practice (amongst other categories), can be downloaded from <http://www.evenett.com/ssafrika.htm>

commitment to enact and enforce competition laws, banning state-promoted anti-competitive practices, encouraging cooperation between competition agencies (by raising the cost of non-cooperation), and promoting technical assistance. National policymakers in ACP countries should ask themselves what serious alternatives they have to promoting competition law in their jurisdictions to the EPAs and why the poor in their countries should continue to have their interests sacrificed to those of incumbent firms with market power. There are many policy options of varying degrees of ambition for the inclusion of competition provisions in the EPAs that still need to be negotiated. The competition provisions in the CARIFORUM EPA could provide the base-line upon which further disciplines could be added in the following areas. First, disciplines could be included in the EPAs that explicitly ban trade-related anti-competitive practices, such as state-created or state-promoted export cartels. Signatories could also affirm that the cartelisation by their own firms of another party's markets is unacceptable and that cooperation between enforcement agencies to investigate such cartels is a priority. The development of EPA-wide leniency programmes, the national equivalent of which has proved to be very effective in prosecuting cartels, could also be prioritised.

Second, that the exemptions to national competition law should be reviewed as part of the EPA negotiation and that, should any exemptions be retained, national mechanisms be established that review periodically those exemptions to assess whether they are still necessary or could be replaced by some other public policy measure that sought to attain the same goal at lower societal cost. More generally, the EPA negotiation could entrench and reinforce the rights and capacity of competition agencies to promote competition, inter-firm rivalry, and the adoption of less distortive state competition. Such advocacy is probably best undertaken by competition agencies that are independent of governments and EPA provisions stipulating such independence could be considered.

Third, while it is difficult to mandate cooperation between competition agencies, the costs of non-cooperation in enforcement cases should be increased. A competition agency that refuses to assist another agency from an EPA signatory in an enforcement matter should be required to state their reasons for doing so in a specific period of time. Moreover, those reasons should be circulated to all EPA signatories and discussed in a committee made up of competition enforcement officials and other government officials. A minority of members of this committee may seek further information from the non-cooperating agency and the latter and its government would be required to respond within a specified period of time. Only in exceptional circumstances would it be acceptable for non-cooperation on the grounds of a reluctance to share confidential business information. Those exceptional circumstances would not extend to enforcement actions against cartels; it being perverse to require that competition agencies cannot share the very confidential information that cartel members typically share amongst themselves to sustain their illicit acts.

Fourth, the provision of technical assistance by competent European agencies and experts to poorer EPA signatories could be specified and review mechanisms established to evaluate existing programmes and to identify better practices.

4 Concluding remarks

The purpose of this paper has been to assess the government procurement-related and competition law-related provisions of the CARIFORUM EPA that was initialled in December 2007. Existing research on these provisions, including research on similar provisions found in recent RTAs, was used to shed light on alternative policy options and to identify the linkages between these policies and the development of ACP nations. It is hoped that the audience for this paper is not confined to those interested in evaluating the CARIFORUM EPA, but also to those negotiating the EPAs that still have to be concluded.

Promoting value-for-money and choice in public purchasing and deterring and punishing anti-competitive corporate acts both have important societal payoffs, in developing and richer countries alike. This paper reviews the evidence and arguments concerning the efficacy of public procurement reform and promoting competition in developing countries and argues that both are worthy objectives of state policymaking. No provisions in the CARIFORUM EPA were found to undermine these pro-developmental objectives. If anything, our concern is that the relevant CARIFORUM EPA provisions do not go far enough and, by implication, that the level of ambition sought by developing countries and the EC in future EPA negotiations should be higher.

Central to the case for more ambitious provisions in the areas of public procurement and competition law and policy is the recognition that trade agreements--like the EPAs--can be used for non-mercantilist purposes. Trade agreements can be used to define and entrench policies and principles that affect the conditions of competition in markets and effectively distribute the benefits of open borders more widely. Moreover, trade agreements can be used to bolster domestic state institutions, such as the agency responsible for enforcing competition law. An emphasis on zero-sum thinking and market access may have blinded some observers to the constructive approaches possible through Economic Partnership Agreements.

With respect to public procurement practices, this paper recommends that future EPAs include a full suite of public procurement provisions and are not confined to improving the transparency of public procurement practices. As noted in section 2, steps to increase the number of bidders for state contracts can proceed in stages, with the first stage being to create regional procurement markets among the non-EC signatories of EPAs. Exceptions to procurement provisions should be limited, defined with specific public policy purposes in mind, and reviewed regularly for effectiveness. The users of public services, which are typically the most vulnerable in developing countries, cannot afford to be indirectly subsidising inefficient domestic firms.

With respect to competition provisions in the EPAs, measures to enact and enforce anti-competitive practices should be complemented by provisions in the following four areas: state-promoted anti-competitive practices, exemptions to national competition law and competition advocacy, raising the cost of non-cooperation in enforcement matters by competition agencies, and technical assistance and capacity building. Adoption of such provisions would demonstrate how a trade agreement can be used to strengthen an important national regulatory institution and cooperation between such institutions.

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6 Appendix 1

Procurements covered by the CARIFORUM-EC EPA.

Below is an excerpt from the CARIFORUM-EC EPA that states the entities covered by the procurement provisions of this agreement.

Annex 6 COVERED PROCUREMENTS

Appendix 11 Entities which Procure in Accordance with the Provisions of Chapter 3 of Title IV

Section 1: Commitments by the Signatory CARIFORUM States

SUPPLIES Thresholds: SDR 155,000

SERVICES Specified in Appendix 2 to this Annex

Thresholds: SDR 155,000

WORKS Specified in Appendix 3 to this Annex

Thresholds: SDR 6,500,000

LIST OF ENTITIES

Antigua and Barbuda

1. Office of the Prime Minister
2. Ministry of Foreign Affairs
3. Ministry of Public Information and Broadcasting
4. Ministry of Labour
5. Ministry of Establishment
6. Ministry of Tourism
7. Ministry of Civil Aviation
8. Ministry of Works, Transformation and the Environment
9. Ministry of Finance and the Economy
10. Ministry of Industry and Commerce
11. Ministry of Legal Affairs
12. Ministry of Justice
13. Ministry of Health
14. Ministry of Sports and Youth Affairs
15. Ministry of Housing, Culture and Social Transformation
16. Ministry of Education
17. Ministry of Agriculture, Lands, Marine Resources & Agro Industries
18. Office of the Governor General
19. Office of the Cabinet
20. Auditor General Department
21. Office of the Ombudsman
22. Office of the Parliament

Barbados

1. Office of the Governor General
2. Department of the Judiciary
3. Office of the Parliament
4. Prime Minister's Office
5. Ministry of Finance
6. Cabinet Office

7. Ministry of the Civil Service
8. Office of the Ombudsman
9. Auditor General Department
10. Ministry of Commerce, Consumer Affairs and Business Development
11. Ministry of Economic Affairs and Development
12. Ministry of Health
13. Ministry of Social Transformation
14. Ministry of Agriculture and Rural Development
15. Ministry of Energy and the Environment
16. Ministry of Tourism and International Transport
17. Ministry of Home Affairs
18. Director of Public Prosecutions
19. Attorney General Department
20. Ministry of Foreign Affairs and Foreign Trade
21. Ministry of Education, Youth Affairs and Sports
22. Ministry of Labour and Public Sector Reform
23. Ministry of Public Works and Transport
24. Ministry of Housing and Lands

The Bahamas

1. Office of the Prime Minister
2. Ministry of Public Works and Transport
3. Ministry of Tourism & Aviation
4. Ministry of Foreign Affairs
5. Ministry of Education, Youth, Sports & Culture
6. Ministry of Agriculture and Marine Resources
7. Ministry of Labour & Maritime Affairs
8. Ministry of Lands & Local Government
9. Ministry of Housing & National Insurance
10. Ministry of National Security
11. Ministry of Finance

Belize

1. Attorney General's Ministry
2. Ministry of Education and Labour
3. Ministry of Agriculture and Fisheries
4. Ministry of Defence, Housing, Youth and Sports
5. Ministry of Finance and the Public Service
6. Ministry of Foreign Affairs and Foreign Trade
7. Ministry of Health, Local Government, Transport and Communications
8. Ministry of Home Affairs and Public Utilities
9. Ministry of Human Development
10. Ministry of National Development, Investment and Culture
11. Ministry of National Resources and Environment
12. Ministry of Tourism, Information and National Emergency Management
13. Ministry of Works
14. Office of Contactor General
15. Office of Ombudsman
16. Offices of the Prime Minister and Cabinet
17. Auditor General
18. Office of the Governor General

Dominica

1. Ministry of Public Works and Public Utilities
2. Ministry of Tourism, Industry and Private Sector Relations
3. Ministry of Agriculture, Fisheries and the Environment
4. Ministry of Education, Human Resource Development, Sports and Youth Affairs
5. Ministry of Finance and Planning
6. Ministry of Housing, Lands, Telecommunications, Energy and Ports
7. Ministry of Health and Social Security
8. Ministry of Community Development, Information and Gender Affairs
9. Ministry of Legal Affairs and Immigration
10. Ministry of Foreign Affairs, Trade and Labour
11. Establishment, Personnel and Training Department
12. Office of the Prime Minister

Dominican Republic

1. Contraloría General de la República
2. Secretaría de Estado de Interior y Policía
3. Secretaría de Estado de las Fuerzas Armadas
4. Secretaría de Estado de Relaciones Exteriores
5. Secretaría de Estado de Agricultura
6. Secretaría de Estado de Hacienda
7. Secretaría de Estado de Educación
8. Secretaría de Estado de Salud Pública y Asistencia Social
9. Secretaría de Estado de Deportes, Educación Física y Recreación
10. Secretaría de Estado de Trabajo
11. Secretaría de Estado de Industria y Comercio
12. Secretaría de Estado de Turismo
13. Secretaría de Estado de la Mujer
14. Secretaría de Estado de la Juventud
15. Secretaría de Estado de Educación Superior, Ciencia y Tecnología
16. Secretaría de Estado de Obras Públicas y Comunicaciones
17. Secretaría de Estado de Medio Ambiente y Recursos Naturales
18. Secretaría de Estado de Cultura
19. La Presidencia de la República Dominicana
20. Secretaría de Estado de Economía, Planificación y Desarrollo
21. Secretaría de Estado de la Presidencia
22. Secretariado Administrativo de la Presidencia

Grenada

1. Ministry of Communications and Works
2. Ministry of Finance
3. Ministry of Education
4. Ministry of Health
5. Ministry of Agriculture
6. Ministry of Housing

Guyana

1. Office of the Prime Minister
2. Ministry of Health
3. Ministry of Finance
4. Ministry of Home- Affairs
5. Ministry of Agriculture
6. Ministry of Public Works and Communications
7. Ministry of Health

8. Ministry of Education

Haiti

1. Conseil National des Marchés Publics
2. Ministère des Travaux Publics, Transports et Communications
3. Ministère de l'Economie et des Finances
4. Ministère de l'Education Nationale et de la Formation Professionnelle
5. Ministère de la Justice et de la Sécurité Publique
6. Ministère de la Santé Publique et de la Population

Jamaica

1. Accountant General
2. Customs Department
3. Department of Correctional Services
4. Office of The Contractor General
5. Office of The Governor General And Staff
6. Office of The Prime Minister
7. Office of The Cabinet
8. Ministry of Agriculture
9. Ministry of Education
10. Ministry of Energy, Mining And Telecommunications
11. Ministry Finance And The Public Service
12. Ministry of Foreign Affairs And Foreign Trade
13. Ministry of Health And Environment
14. Ministry of Industry, Commerce And Investment
15. Ministry of Information, Culture, Youth And Sports
16. Ministry of Justice
17. Ministry of Labour And Social Security
18. Ministry of National Security
19. Ministry of Tourism
20. Ministry of Transport And Works
21. Ministry of Water And Housing
22. Jamaica Fire Brigade

Saint Christopher and Nevis

1. The Ministry of Finance – Central Purchasing Office
2. The Ministry of Industry, Commerce and Consumer Affairs – Supply Office
3. Ministry of Health

Saint Lucia

1. Office of the Prime Minister
2. Ministry of Finance and Physical Development
3. Ministry of Home Affairs and National Security
4. Ministry of Social Transformation, Human Services, Family Affairs, Youth and Sports
5. Ministry of Health and Labour Relations
6. Ministry of Agriculture, Forestry and Fisheries
7. Ministry of Education and Culture
8. Ministry of External Affairs, International Financial Services and Broadcasting
9. Ministry of Housing, Urban Renewal and Local Government
10. Ministry of Communications, Works, Transport and Public Utilities
11. Ministry of Trade, Industry and Commerce

12. Ministry of Economic Affairs and Economic Planning, National Development and the Public Service
13. Ministry of Tourism and Civil Aviation

Saint Vincent and the Grenadines

1. Ministry of Finance

Suriname

1. Ministry of Trade and Industry
2. Ministry of Finance
3. Ministry of Public Health
4. Ministry of Foreign Affairs
5. Ministry of Defense
6. Ministry of Home Affairs
7. Ministry of Justice and Police
8. Ministry of Natural Resources
9. Ministry of Agriculture, Animal Husbandry and Fisheries
10. Ministry of Education and Community Development
11. Ministry of Public Works
12. Ministry of Regional Development
13. Ministry of Planning and Development Cooperation
14. Ministry of Labour, Technology and Environment
15. Ministry of Social Affairs and Housing
16. Ministry of Transport, Communication and tourism
17. Ministry of Physical Planning, Land and Forestry Management

Trinidad and Tobago

1. Ministry of Agriculture, Land and Marine Resources
2. Ministry of Community Development, Culture and Gender Affairs
3. Ministry of Education
4. Ministry of Energy and Energy Industries
5. Ministry of Finance
6. Ministry of Foreign Affairs
7. Ministry of Health
8. Ministry of Housing
9. Ministry of Labour and Small and Micro-Enterprises Development
10. Ministry of Legal Affairs
11. Ministry of Local Government
12. Ministry of National Security
13. Ministry of Planning and Development
14. Ministry of Public Administration and Information
15. Ministry of Public Utilities and the Environment
16. Ministry of Science, Technology and Tertiary Education
17. Ministry of Social Development
18. Ministry of Sport and Youth Affairs
19. Office of the Attorney General
20. Ministry of Tourism
21. Ministry of Trade and Industry
22. Ministry of Works and Transport
23. Office of the Prime Minister

Section 2: Commitments by the EC Party

SUPPLIES Thresholds: SDR 130,000
SERVICES Specified in Appendix 2 to this Annex
Thresholds: SDR 130,000
WORKS Specified in Appendix 3 to this Annex
Thresholds: SDR 5,000,000

LIST OF ENTITIES

All entities listed by the European Communities in Annex 1 to Appendix I of the Agreement on Government Procurement concluded under the auspices of the World Trade Organisation, as that Appendix may apply from time to time and including any conditions, limitations and derogations mentioned therein.

Without prejudice to any rights and obligations, this list is publicly available at the following web site: http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#ec

Services Section 1: Commitments by the Signatory CARIFORUM States

All services procured by the covered entities listed in Appendix 1, pursuant to the conditions, limitations and derogations contained in Chapter 3 of Title IV, and subject to the General Notes and Derogations in Appendix 4.

Section 2: Commitments by the EC Party

All services listed by the European Communities in Annex 4 to Appendix I of the Agreement on Government Procurement concluded under the auspices of the World Trade Organisation, as that Appendix may apply from time to time and including any conditions, limitations and derogations mentioned therein.

Without prejudice to any rights and obligations, this list is publicly available at the following web site: http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#ec

Construction Services DEFINITION:

For the purposes of the Chapter on Public Procurement, a construction services or works contract is a contract which has as its objective the realization by whatever means of civil or building works, in the sense of Division 51 of the Central Product Classification. The provisions of the Chapter on Public Procurement shall apply to the procurement of construction services contained in Division 51 of the Central Product Classification.

General Notes and Derogations from the provisions of Chapter 3 of Title IV Signatory CARIFORUM States

1. Subject to paragraph 6, the provisions of Chapter 3 of Title IV shall be applicable to the entities as listed under Appendix 1, and do not include other agencies of government which may fall within the portfolio of the listed entities.
2. The provisions of the Chapter on Public Procurement shall not be applicable to procurement by the covered entities listed under Appendix 1 in connection with activities in the field of energy and the postal sector.
3. The Signatory CARIFORUM States reserve the right to participate in public contract award procedures or to provide for such contracts to be performed in the context of sheltered projects or programmes, including sheltered employment programmes for the handicapped or incarcerated, and relief employment programmes and projects.
4. By derogation to Article 171(2)(f), the total value of contracts awarded for the additional services shall not exceed one hundred percent of the amount of the original contract.
5. The primary means of publication in respect of Annex 7 Parts 1, 2 and 3, shall be the CARIFORUM regional on-line facility established pursuant to the provisions of Article 182(2) and consistent with the provisions of Article 180(4).
6. There is no obligation on CARIFORUM States to officially publish judicial decisions.

7. In respect of the Dominican Republic, the provisions of the Chapter on Public Procurement shall apply to the entities listed in Appendix 1 including gobernaciones and other agencies of government that fall within the portfolio of such entities, except under the following circumstances and conditions:

a) Secretaría de Estado de Interior y Policía: This Chapter does not cover:

(a) procurement by the Dirección General de Migración; or (b) procurement by the Policía Nacional of: (i) goods classified under Group 447 (weapons and ammunition and parts thereof) of the United Nations Central Product Classification 1.0 (CPC, version 1.0), or (ii) combat, assault and tactical vehicles.

b) Policía Nacional in the Secretaría de Estado de Interior y Policía and Secretaría de Estado de las Fuerzas Armadas: This Chapter does not cover procurement of goods classified under Section 2 (food products, beverages and tobacco; textiles, apparel and leather products) of the CPC.

c) Secretaría de Estado de las Fuerzas Armadas: This Chapter does not cover: (a) procurement by the Departamento Nacional de Investigación, and the Instituto de Altos Estudios para la Defensa y Seguridad Nacional; or (b) procurement of: (i) goods classified under Group 447 (weapons and ammunition and parts thereof) of the CPC; (ii) aircraft, airframe structural components, aircraft components, parts and accessories; (iii) landing and ground handling equipment; (iv) docks; (v) ships and ship components, parts and accessories; (vi) marine equipment; or (vii) combat, assault and tactical vehicles.

d) Secretaría de Estado de Relaciones Exteriores: This Chapter does not cover procurement by the Dirección General de Pasaportes for the production of passports.

e) Secretaría de Estado de Agricultura: This Chapter does not cover procurement made in furtherance of agricultural support programs.

f) Secretaría de Estado de Hacienda: This Chapter does not cover procurement by the Tesorería Nacional with regard to the issuance of tax stamps or postage stamps, or the production of checks and treasury bonds.

g) Secretaría de Estado de Educación: This Chapter does not cover procurement made in furtherance of school feeding programs (Desayuno Escolar) or programs to support the dissemination of education, the wellbeing of students, or the accessibility of education, including at the border with Haiti (Zona Fronteriza) and in other rural or impoverished areas.

h) Secretariado Técnico de la Presidencia: This Chapter does not cover procurement by the Comisión Nacional de Asuntos Nucleares.

i) Instituto Dominicano de las Telecomunicaciones (INDOTEL): This Chapter does not apply to procurement of goods and services required for the implementation of special projects executed by the Fondo de Desarrollo de las Telecomunicaciones to implement the Política Social sobre Servicio Universal of the Dominican Republic pursuant to the Ley General de Telecomunicaciones No.153-98 and Reglamento del Fondo de Desarrollo de las Telecomunicaciones.

j) Banco Central de la República Dominicana: This Chapter does not cover the issuance of currency and coins.

The EC Party

1. Procurement by procuring entities covered under Appendix 1 in connection with activities in the fields of drinking water, energy, transport and the postal sector are not covered by this Chapter.

2. The Member States of the European Union may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

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